No. 93-____

93-57

FILED

JUL 7 1993

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KARL EASTON M.D.,

Petitioner,

—vs.—

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH, AND NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the doctrine of judicial estoppel, under which parties cannot assert inconsistent legal arguments to two different courts, rise to a constitutional due process violation when the party raising the inconsistent positions is a State or other governmental entity?

2. Does a state violate an individual's Fourteenth Amendment due process rights when it takes one legal position in one court, succeeds on that argument and then takes an inconsistent position in a later proceeding and then wins the second case on that incompatible proposition?

3. Is an individual's Fourteenth Amendment due process rights violated when a court issues a multimillion dollar judgment against the party in favor of a state litigant on the basis of no evidence to sustain the finding?

LIST OF PARTIES

The parties to this Petition are Dr. Karl Easton and the People of the State of New York, the New York Office of Mental Health and the New York State Department of Social Services.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Constitutional Provisions Involved	1
Statement of the Case	2
REASONS FOR GRANTING THE WRIT	9
I. THE COURT SHOULD DECIDE WHETHER THE DUE PROCESS CLAUSE IS VIOLATED WHEN A GOVERNMENTAL BODY TAKES INCONSISTENT POSITIONS IN TWO RELATED LITIGATIONS AND SUCCEEDS IN BOTH PROCEEDINGS	9
II. THE COURT SHOULD DECIDE WHETHER THERE WAS ANY EVIDENCE TO SUPPORT THE FINDING THAT PETITIONER EASTON CONTROLLED THE AFFAIRS OF BPRI	16
CONCLUSION	19
APPENDIX A	
ORDER OF NEW YORK COURT OF APPEALS DENYING MOTION FOR REARGUMENT OF MOTION FOR LEAVE TO APPEAL	1a

APPENDIX B

ORDER OF NEW YORK COURT OF APPEALS DENYING LEAVE TO APPEAL DATED JANUARY 7, 1993 ..... 3a

APPENDIX C

ORDER OF APPELLATE DIVISION SECOND DEPARTMENT DENYING LEAVE TO APPEAL DATED SEPTEMBER 10, 1992 ..... 5a

APPENDIX D

DECISION AND ORDER OF APPELLATE DIVISION SECOND DEPARTMENT DATED JULY 6, 1992 ..... 7a

APPENDIX E

MODIFIED JUDGMENT SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY DATED AUGUST 3, 1992 ..... 15a

APPENDIX F

DECISION OF JUDICIAL HEARING OFFICER CARMINE A. VENTIERA DATED MAY 6, 1991 ..... 19a

TABLE OF AUTHORITIES

CASES

Page

Delgrosso v. Spang and Co., 903 F.2d 234 (3d Cir. 1990) . . . 3, 14

Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388 (7th Cir. 1992). . . 13

Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) 15

Easton v. Sundram, 947 F.2d 1011 (2d Cir. 1991), cert. denied, 112 S. Ct. 1943 (1992) . . . 2, 4, 6, 7, 9, 10, 11, 12

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1977) 12

Gilmore v. Shearson/American Express, 811 F.2d 108 (2d Cir. 1986) 14

Nichols v. Collins, 802 F. Supp. 66 (S.D. Tex. 1992) 15

Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208 (1st Cir. 1987) . 14

Reynolds v. C.I.R., 861 F.2d 469 (6th Cir. 1988) 14

Scarano v. Central R.R., 203 F.2d 510 (3d Cir. 1953) 3, 14

Thompson v. Louisville, 362 U.S. 199 (1960) 18

STATUTES

28 U.S.C. 1257(a) 1

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

Petitioner Karl Easton prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of New York, Appellate Division, Second Department.

OPINIONS BELOW

The opinion and order of the Appellate Division, Second Department (Appendix D, infra, 7a-14a), reversing the decision and judgments of Judicial Hearing Officer Carmine Ventiera is reported at 185 A.D.2d 230, 585 N.Y.S.2d 776 (2d Dept. 1992). The opinion of the Judicial Hearing Officer is unreported and is reproduced in Appendix at 19a- 70a.

STATEMENT OF JURISDICTION

The order and decision of the Appellate Division, Second Department appealed from (Appendix D at 7a-14a) was entered on July 6, 1992. A timely motion for leave to appeal to the New York Court of Appeals was denied by the Appellate Division on September 10, 1992 (Appendix C, 5a-6a). A motion for leave to appeal to the New York Court of Appeals was denied by the Court of Appeals on January 7, 1993. (Appendix B at 3a-4a). A timely motion for reargument of the denial of leave to appeal was filed on February 22, 1993 and was denied by the Court of Appeals on April 8, 1993 (Appendix A, at 1a-2a). The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Introduction.

This case involves an issue never previously examined by this Court: does the doctrine of judicial estoppel, under which parties cannot assert inconsistent legal arguments to two different courts, rise to a constitutional due process violation when the party raising the inconsistent positions is a State or other governmental entity? Phrased another way, does a state violate an individual's due process rights when it takes one legal position in one court, succeeds on that argument and then takes an inconsistent position in a later proceeding and then wins the second case on that incompatible proposition?

That is exactly what occurred in this matter. The State of New York presented a certain legal argument as a defendant in certain Section 1983 litigation arising in federal court, arguing that Petitioner Karl Easton was a separate entity from the not-for-profit mental health agency for whom he was the medical director, the Brooklyn Psychosocial Rehabilitation Institute ("BPRI"). Thus, the State argued and the federal court held, that he could not assert or rely upon the First Amendment rights of that entity. See *Easton v. Sundram*, 947 F.2d 1011, 1015 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1943 (1992). It succeeded in that argument before the Second Circuit.

At the same time, the State took a diametrically opposite position in related state court litigation, arguing that Easton and BPRI were alter egos of each other and the actions of one must to attributed to the other. It has now succeeded in having that inconsistent position adopted by the New York State courts.

It is axiomatic that litigants cannot play "fast and loose" with the courts. The "doctrine [of judicial estoppel] precludes a party from assuming a position in

a legal proceeding that contradicts or is inconsistent with a previously appointed position . . . . To permit a party to assume a position inconsistent with a position it had successfully relied upon in a past proceeding 'would most significantly exemplify . . . playing "fast and loose with the courts" which has been emphasized as an evil the courts should not tolerate.'" *Delgrosso v. Spang and Co.*, 903 F.2d 234, 241, 242 (3d Cir. 1990), citing *Scarano v. Central R.R.*, 203 F.2d 510, 513 (3d Cir. 1953).

Where the inconsistency is presented by a governmental body, it is Petitioner's position that the due process clause of the Fourteenth Amendment requires that the government be foreclosed from presenting in a later proceeding an argument opposite to that on which it has already succeeded. Since the order and decision of the Appellate Division, Second Department, appealed from in this action is based upon an argument opposite to that which New York State presented and on which it succeeded in the Second Circuit, the judgment should be reversed and the state should be barred in any subsequent proceeding from presenting any argument contrary to that which it had previously asserted and on which it succeeded.

Statement of Facts

Petitioner, a psychiatrist and Diplomate of the American Board of Psychiatry, was the first Director of Psychiatry of the New York City Department of Welfare, later the Human Services Administration. In 1967, he founded a rehabilitative and residential care program for people with mental health disorders in Brooklyn, primarily for persons recently discharged from mental hospitals into the community. He then operated a not-for-profit mental health agency called Brooklyn Psychosocial Rehabilitation Institute ("BPRI").

In July 1984, a patient at Boerum Hill, BPRI's residential and rehabilitative care facility, committed suicide. The New York State Office of Mental Health

("OMH") then instituted a recertification inspection of the facility, 947 F.2d at 1013.

In December, 1984, the New York City regional director of OMH suspended patient referrals to Boerum Hill.

In response, BPRI commenced a mandamus proceeding under Article 78 of the New York Civil Practice Law and Rules against OMH, alleging that BPRI's due process rights were being violated, since no hearing had been held before the OMH action barring referrals had been taken. The State Supreme Court upheld BPRI's contention and ordered OMH to provide the hearing required by New York Mental Health Law § 31.15 before any adverse action was taken. See 947 F.2d at 1013. No hearing was ever held.

OMH next moved against BPRI and Dr. Easton by commissioning an investigation into BPRI by eight experts in the field of psychiatry. The commission, headed by Dr. Charles Tucek interviewed ninety-three BPRI patients and reviewed all of their charts (App. Div. Record, R175-180).

Following its exhaustive investigation, the commission issued a lengthy report (the "Tucek Report") commending BPRI and Dr. Easton for conducting a program for the mentally ill which provided "... significantly good care, both in quantity of care provided and quality of care provided." (Ex. MM2, R 182-186, 191).

Since professional psychiatrists had found the BPRI program to be excellent, OMH decided not to use professionals to make its next investigation. Instead, a team of non-professional investigators, headed by John Rybaltowski ("Rybaltowski") was dispatched to conduct what can only be described as a witch-hunt at BPRI.

In addition, another state agency the Commission on the Quality of Care ("CQC") started an investigation of BPRI later in 1985.

The Commencement of the Instant Action

In October, 1986, the three respondents in this action, the People of the State of New York (the "State"), the New York Office of Mental Health ("OMH") and the New York State Department of Social Services ("DSS") commenced an action for Medicaid fraud against BPRI, Dr. Karl Easton, the Medical Director of BPRI during the relevant time periods, Jacqualine Easton, Dr. Easton's wife, Irving Link, the Executive Director of the BPRI, Theodore Rosten, the accountant for BPRI, and 3 Lafayette Avenue Corp. ("3LAC") and Cobble Hill Center Corp. ("CHCC"), two corporations which owned property leased by BPRI at which BPRI ran two Community Residences in connection with its mental health programs.

The gist of the lawsuit was the claim that BPRI, at the direction of Dr. Easton, allegedly defrauded Medicaid by billing it for "Home Visits" which did not in fact meet the statutory definition of "Home Visits" as set forth in 14 NYCRR former §§579.5(e) and 579.6[a][5]; [b][5]; [c][5] [effective August 10, 1982, repealed Apr. 5, 1988]. Personal liability against Dr. Easton was sought under Social Services Law §145-b upon the allegation that Dr. Easton fraudulently obtained such Medicaid funds "on behalf of himself and others." Respondents argued, and the Second Department apparently agreed, that (notwithstanding Respondents investigator's and its own witnesses testimony at trial to the contrary, and contrary to the position taken by Respondents in related federal litigation, as explained below) Dr. Easton "controlled" BPRI, that he personally designed and implemented BPRI's Home Visit Medicaid billing policy, and that he personally profited from such policy in that the Medicaid payments were funnelled to him in the form of "inflated rents" paid by BPRI to CHCC and

3LAC. Dr. Easton was president of these realty corporations.

The Federal Action

While the state court proceedings continued, in 1989, Petitioner Karl Easton commenced a Section 1983 action in federal court against the state officials responsible for the campaign against him. He alleged that the state officials had engaged in a concerted campaign to deprive him of his constitutional rights. Among the rights alleged to have been violated was his First Amendment right to petition for redress of grievances. Petitioner Easton alleged that the state officials had commenced the instant proceeding in retaliation for the Article 78 proceeding brought in state court by BPRI in 1985 in which it had succeeded in enjoining OMH from suspending referrals to Boerum Hill without a hearing. 947 F.2d at 1013.

On July 12, 1990, Judge Sweet of the Southern District of New York issued a decision dismissing the Section 1983 complaint. The District Court found that no cognizable constitutional rights of Petitioner had been violated, 947 F.2d at 1014.

On appeal to the Second Circuit, the Court of Appeals affirmed the order of dismissal, 947 F.2d 1011.

On the First Amendment claim, the Court of Appeals found that Petitioner had properly alleged that the state court litigation brought by BPRI (to prevent loss of state referrals without a hearing) was protected by the First Amendment. Therefore, any adverse state action taken in retaliation for that conduct would be unconstitutional under the First Amendment. However, relying upon the State defendants' arguments, the Court of Appeals noted that the original state court action was commenced by BPRI, the agency, and not by Petitioner Karl Easton personally. The federal complaint, however, alleged a campaign by state officials against Petitioner in his personal capacity. Therefore Petitioner's claim must

fail "because he himself has not engaged in conduct deserving of First Amendment protection, and therefore any alleged retaliation against him could not have been in violation of his First Amendment rights." 947 F.2d at 1015.

The Decisions Below

After hearing testimony from and assessing the credibility of numerous witnesses, and after carefully analyzing the evidence for several months following trial, the Supreme Court, Kings County, (in a decision by J.H.O. Ventiera to whom the case was assigned) issued a painstakingly thorough 86-page decision which totally exonerated defendants of any wrongdoing and dismissed the complaint in its entirety.

In the decision issued on November 7, 1990, the trial court found that none of the charges of substandard care, medicaid fraud and overcharging could be sustained. He ordered the entire proceedings against Petitioner dismissed. (19a-70a). The state trial court specifically found that "the quality of care is in compliance with the Regulations and guidelines" (48a) and that the care was "adequate, satisfactory and sufficient" (65a). He also found that the methodology used by the inspectors from CQC was "not actual or accurate." (64a). He also found that there was no "misappropriation of rents" by Petitioner or members of his family (68a). He concluded that there was no basis for charging Petitioner with MEDICAID fraud. (68a).

In a decision and order dated July 6, 1992, the Appellate Division Second Department reversed. It found that "the defendants had fraudulently billed Medicaid for 'home visits' that were not actually performed." (10a). It held, as a result:

> The record thus reflects that between January 1985 and October 1986, through a scheme devised and implemented by Dr. Karl Easton, BPRI received $2,524,501 in public funds

for "home visits" that did not qualify for reimbursement under the OMH regulations (12a).

The Appellate Division further found that Petitioner Karl Easton "controlled" BPRI and therefore was responsible for implementing the fraudulent practices.

> Social Services Law §145-b places personal liability on any individual who "knowingly by means of false statement or representation or by deliberate concealment of any material fact" falsely obtains - public funds, "on behalf of himself or others". Where public welfare benefits are obtained fraudulently by an entity (e.g., BPRI), the individual supervising, overseeing, performing or conspiring to effectuate the fraudulent acts can be held personally responsible, and is liable for treble damages. . . . It is clear from the trial testimony that Easton designed, supervised, and implemented BPRI's "home visit" billing fraud on Medicaid.
>
> Moreover, the plaintiffs proved that this fraud inured to the benefit of Easton and his family. BPRI's leases with Easton's realty corporations contained steep escalation clauses and leases were per se not negotiated at "arms length" as Department of Health (hereinafter DOH) sides of the bargaining cable, in his not-for-profit capacity as Medical Director of BPRI, and his for-profit role as ultimate owner of CHCC and 3LAC. . . . Through Easton's *de facto* control of the two realty corporations, which were ostensibly owned by his children, the family was personally enriched when funds collected from the Medicaid fraud were paid in the form of grossly inflated rents. (13a)

In reaching its determination, the Second Department substituted its contrary findings of fact for those of the trial court, made new findings of fact that were unsupported by any evidence in the record on appeal and even contradicted stipulations of fact entered into at the trial. See discussion in Point II below.

More important, the finding of MEDICAID fraud and the imposition of a $7,500,000 judgment against Petitioner Karl Easton personally -- the largest ever recorded for MEDICAID fraud in the state -- was totally dependent on the finding that Dr. Easton was the "the individual supervising, overseeing, performing or conspiring to effectuate the fraudulent acts" (13a). Therefore the Appellate Division concluded that he "can be held personally responsible," for the alleged overcharges (*Id.*). But that position, taken by the Court on the basis of the States' arguments, is totally inconsistent with New York's position in the related federal court litigation. There the state argued that Dr. Easton could not rely on any actions taken by BPRI since they were not one and the same entity and therefore "he himself has not engaged in conduct deserving of First Amendment protection" when BPRI brought the Article 78 proceeding.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD DECIDE WHETHER THE DUE PROCESS CLAUSE IS VIOLATED WHEN A GOVERNMENTAL BODY TAKES INCONSISTENT POSITIONS IN TWO RELATED LITIGATIONS AND SUCCEEDS IN BOTH PROCEEDINGS

A crucial question in the parallel state and federal proceedings was the issue of Dr. Easton's control over BPRI. When it was to their benefit to do so, the Attorney General's Office of the State of New York (representing the Respondents here and the defendants

in the federal proceedings) have asserted that BPRI and Karl Easton were the same entities, a "rubber stamp" of each other. *See, Brief for Plaintiffs-Appellants, Appellate Division, Second Department*, at 72. In their brief to the Second Department, the State emphasized again and again that "Karl Easton controlled BPRI's Board of Directors." (*id.* at 71). The State alleged: "Plaintiffs submitted a plethora of uncontroverted evidence at trial that the BPRI board was improperly controlled by Karl Easton." (*id.*) On the issue of the negotiation of the leases, the State alleged: "Karl Easton sat at both sides of the bargaining table when the leases were adopted and *BPRI was at all times subject to his 'overmastering influence.*'" (*id.* at 74)(emphasis added).

On the other hand, when it was in their interest to assert the opposite, Respondents asserted that Dr. Easton did not control BPRI and that it was a totally separate entity. In the related case, namely, Dr. Easton's federal civil rights action (see *Easton v. Sundram*, 947 F.2d 1011 (2d Cir. 1991)), Dr. Easton claimed that he had been deprived of both his liberty and his property without due process of law because of the instant state proceedings that had been asserted against him and BPRI. The State answered this contention by arguing in its federal court brief that Dr. Easton had no standing and could not complain about BPRI's loss of its operating certificate because the two entities were separate and distinct: "Similarly, Easton had no protected property interest in BPRI's operating certificate or in continued funding for BPRI. *BPRI was a not for-profit-corporation and Easton was only an ex officio board member.* The damage, if any, was to the corporate entity." *Easton v. Sundram*, 89 Civ. 1839 (RWS)(S.D.N.Y. 1990), *Defendants' Memorandum of Law in Support of their Motion to Dismiss the Complaint or, in the Alternative, for Summary Judgment*," dated January 18, 1990, at 25 (emphasis added).

In addition, in the federal court action, the State claimed: "he (Dr. Easton) had no legal ownership interest in the realty corporations [CHCC and 3LAC]"

(id. at page 28). However, in this State action, the state argued that Dr. Easton owned the corporations and had an interest in BPRI's funding and the Appellate Division then so found.

Judge Sweet, sitting in the U.S.D.C., accepted Respondents' argument that Dr. Easton does not own the realty corporations, that he had no interest in BPRI's funding, and that he was only an ex-officio board member (not a controlling party) of BPRI. In his decision dated July 12, 1990 dismissing the federal complaint, Judge Robert W. Sweet stated (*Easton v. Sundram*, 89 Civ. 1839 (S.D.N.Y. July 12, 1990, p. 12-14)):

> His (Easton's) lack of any ownership of these family-owned corporations precludes Easton from asserting a cause of action for deprivation of property right under the due process clause....*Easton for like reasons had no protected property interest in BPRI's operating certificate or in continued funding for BPRI. BPRI was a not-for-profit corporation and Easton an ex-officio board member.* (emphasis added).

In addition, Dr. Easton asserted in the federal civil rights case that his "liberty" right was violated by the BPRI proceedings, in that the state officials took steps to seize BPRI in retaliation for the fact that BPRI had previously brought a successful Article 78 proceeding against the OMH after it had attempted to stop referrals to the facility. These actions, Dr. Easton alleged, violated his First Amendment rights. See *Easton v. Sundram*, 947 F.2d at 1015.

In the federal action, the same state officials who had argued in the instant action that BPRI and Easton were mirror-images or a "rubber-stamp" of each other, took the opposite position. They argued in their federal papers (*Easton v. Sundram*, Dkt. No. 91-7165, Second Circuit Court of Appeals, *Brief for Defendants-Appellees*, dated April, 1991, at 42):

> Plaintiff's argument thus ignores the fact that *he and BPRI are not the same person*. Rather, *BPRI is a separate entity which may assert its own First Amendment rights*. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1977). If as plaintiff alleges, defendants sought to retaliate because OMH was unsuccessful in the Article 78 proceeding, *BPRI's First Amendment rights were implicated, not Easton's*. (emphasis added).

In its decision, reported at 947 F.2d at 1015, the Second Circuit accepted this argument. The Court agreed that the "institution of an Article 78 lawsuit may constitute First Amendment protected activity, . . " But the Court held that the complaint still failed to state a valid constitutional cause of action since it was "BPRI, not Easton, that brought the Article 78 proceeding" referred to, *id.* at 1015. The Court concluded that "Easton's claim . . . fails at the outset because he himself [only BPRI, a separate entity] has not engaged in conduct deserving of First Amendment protection." *id.* at 1015.

The federal district court and the Second Circuit therefore accepted the State's arguments that Dr. Easton and BPRI were not the same entity and the actions of one could not be attributed to the other. Their decisions were made on the basis of the lack of identity between the parties.

However, in these state court proceedings, the opposite was true: as noted above, in their brief to the Second Department the State asserted that "Karl Easton controlled BPRI's Board of Directors." (*id.* at 71). Furthermore, the Second Department adopted and accepted that claim: "The evidence established that Dr. Karl Easton controlled the Brooklyn Psychiatric Rehabilitation Institute (hereinafter BPRI, a not-for-profit corporation, which offered services to the mentally ill" (9a). On that basis they found that Dr. Easton engaged in fraud by devising and implementing a scheme on behalf of BPRI to charge Medicaid for home

visits which did not occur and by negotiating leases for both BPRI and the real estate corporations owned by his family.

But parties cannot play so "fast and loose" with the courts. The State is judicially estopped and bound by the allegation in the federal action that "BPRI was a not for-profit-corporation and Easton was only an ex officio board member," as stated in the district court brief and as accepted by the district court. In addition, they are bound by the claim that Easton and BPRI "are not the same person," as stated in the State's Second Circuit brief and as accepted by the Second Circuit. That proposition must be accepted as true for the purposes of this litigation.

Under the doctrine of judicial estoppel, the state is prohibited from urging an position opposite to one it originally took in the Second Circuit.

The doctrine of judicial estoppel prohibits a party taking two inconsistent legal positions in the course of the same or related legal proceedings. The lower federal courts have adopted the validity of the doctrine. *See e.g., Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1397 (7th Cir. 1992)(Posner, J.): ". . . the doctrine of judicial estoppel prevents 'intentional self-contradiction' from 'being used as a means of obtaining unfair advantage' in litigation. . . its core is the proposition that a party may not use inconsistent positions to win two judgments arising from the same claim."

In a leading discussion of the doctrine, the Third Circuit recently explained:

> This doctrine [of judicial estoppel] precludes a party from assuming a position in a legal proceeding that contradicts or is inconsistent with a previously appointed position . . . . To permit a party to assume a position inconsistent with a position it had successfully relied upon in a past proceeding "would most significantly exemplify . .

> . playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate."
>
> * * * *
>
> Clearly, Spang's position in this phase of the litigation is inconsistent with the position it assumed in the earlier phases of this litigation. Moreover, application of the doctrine of judicial estoppel is particularly appropriate in situations like this, where the party benefited from its original position.

Delgrosso v. Spang and Co., 903 F.2d 234, 241, 242 (3d Cir. 1990), citing *Scarano v. Central R.R.*, 203 F.2d 510, 513 (3d Cir. 1953).

See also *Gilmore v. Shearson/American Express*, 811 F.2d 108, 113 (2d Cir. 1986): "Ordinarily, a party may not freely take inconsistent positions in a law suit and simply ignore the effect of a prior filed document. . . This policy against permitting a party to play 'fast and loose' with the courts . . . is particularly applicable here. . . ;" *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 214 (1st Cir. 1987)("If parties feel free to select contradictory positions before different tribunals to suit their ends, the integrity and efficacy of courts will suffer"); *Reynolds v. C.I.R.*, 861 F.2d 469, 472 (6th Cir. 1988)("The judicial estoppel doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.")

This doctrine is especially applicable when the party taking inconsistent positions is a governmental party subject to the due process clause. *See e.g. Reynolds v. C.I.R.*, 861 F.2d 469, 474 (6th Cir. 1988)(I.R.S. cannot take inconsistent positions on who owned capital asset in order to maximize taxable income; judicial estoppel

doctrine applied since court would not accept "knowing assault upon the integrity of the judicial system").

Lower federal courts have accepted this proposition in the criminal law field and have found constitutional violations when prosecutors have taken inconsistent positions in related or successive criminal actions. Thus in *Drake v. Kemp*, 762 F.2d 1449, 1470 (11th Cir. 1985)(Clark, J. concurring), the prosecutor had argued in one murder trial that one defendant had actually done the killing at issue. In a subsequent prosecution, the prosecutor argued the opposite, laying responsibility on another individual. Judge Clark found that a constitutional violation had occurred: "As the state habeas judge recognized, the prosecutions theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories was inherently unfair." *id.* at 1479.

See also *Nichols v. Collins*, 802 F. Supp. 66 (S.D. Tex. 1992)(habeas corpus writ granted for constitutional violation when state prosecutors took inconsistent positions in successive criminal prosecutions).

The application of the above doctrine to this case would require reversal of the Appellate Department's judgment. If the State parties may not assert, and the State courts may not find, that BPRI and Dr. Easton are mirror images of each other and the actions of one must be attributed to the other, that Dr. Easton controlled BPRI or owned the corporations, then the decision of the Second Department must be reversed. The entire decision relies upon that assertion, which cannot be accepted after the State successfully urged an opposite position in the federal proceedings. This court should grant the petition for certiorari to decide the circumstances under which the well-established doctrine of judicial estoppel has constitutional dimensions when a governmental party is involved.

II.

THE COURT SHOULD DECIDE WHETHER THERE WAS ANY EVIDENCE TO SUPPORT THE FINDING THAT PETITIONER EASTON CONTROLLED THE AFFAIRS OF BPRI

Dr. Easton resigned from BPRI's Board of Directors in 1983 and thereafter served only as the Medical Director of BPRI (R5-20). And yet the Second Department held that Dr. Easton "controlled" BPRI and "designed, supervised and implemented" its Home Visit billing fraud (12a). Thus, the Second Department held Dr. Easton personally liable for the actions of BPRI.

In fact, all of the evidence on record establishes otherwise. OMH's own witnesses testified that, from 1980 on, BPRI was operated independently under the supervision of its Executive Director, Irving Link, its Board of Directors, and its President, Respondents' witness Donald Schwartz (R16-18). All of the witnesses at the trial testified that Dr. Easton did not control BPRI (Ex. XX, R5-20, 722-725, 152, 86, 143-144, 151, 206). Donald Schwartz, the President of BPRI and a high ranking employee of the New York City Department of Social Services, testifying as Respondents' witness, confirmed that Dr. Easton did not control BPRI, that he never dealt with Dr. Easton except as a Board member in the early years and that he never met Dr. Easton prior to joining BPRI at the request of its Executive Director (R 5-29).

The BPRI personnel in charge of billing Medicaid testified that they had no contact with Dr. Easton and had never had any discussions with him regarding Medicaid billing (R249). In fact, Dr. Easton's authority at BPRI was so limited that one of the Respondents' witnesses testified that although Dr. Easton ordered an employee fired, his "order" was countermanded when the employee went over his head to the Executive Director (A 722-725). While Respondents' argued that BPRI was a fiefdom

controlled by the Eastons, another OMH witness testified that Dr. Easton's wife did not even have the authority to change the size of the patients' television sets when she tried to do so (A723-724). Nevertheless, the Second Department held that Dr. Easton controlled BPRI and must be liable in triple damages for any Medicaid fraud.

Witness after witness confirmed that Dr. Easton was merely the Medical Director and did not set policy, including Medicaid billing policy, for BPRI (R 85-86, R152, Ex. XX, R 143, 144, 151-152, 206).

Furthermore, case manager after case manager (including those called by Respondents) testified that Dr. Easton, as Medical Director, wanted staff to interact with the patients on a daily basis, even just to say "hello, how are you doing" or to wake up the patient personally (R149-150, 170, 210). Everyone at the trial agreed that these were not the Home Visits that were billed to Medicaid. The billable Home Visit had to be 30 minutes, as the case managers all confirmed. (R204, A111, 859, 898, 902)

The trial Court accepted the testimony of the witnesses (including those of Respondents) who confirmed the difference between perfunctory "home visits" that were not billed and those that were (A111, R204). BPRI kept separate records of 1) the perfunctory daily visits, so that Dr. Easton could confirm his orders for patient-staff interaction were being carried out, and 2) those documented 30 minute visits that were actually billed to Medicaid (R204,A859, 898, 902). The trial Court heard testimony, and viewed the different records of visits and found only one visit, out of thousands, that did not meet the statutory requirement of a billable visit.

The Appellate Division disregarded the testimony of the case managers at BPRI and the billing people, and it did not view the different set of records for Billable Home Visits (that qualified for Medicaid

funding) and the Regular Home Visit Logs which confirmed merely that patients were seen each day. Instead it determined that every patient got billed to Medicaid for a visit every day -- even Respondents never made this claim at the trial. The Court then failed to inquire if any of the visits were justified and found Dr. Easton personally liable (trebled) for every one of the Home Visits over the 1 1/2 year window period.

Respondents' complaint never specified a dollar amount of damages alleged to be owed (R141-167). Nevertheless, on appeal the Second Department granted judgment, and then tripled it, for every Home Visit for which BPRI billed from 1985-1986. In essence, this Court held that of the hundreds of patients cared for by BPRI, not one of them ever received a legitimate Home Visit in over one and one-half years. Even Respondents' investigators never made this claim at the trial. Also, at Respondents request the judgment was entered against Dr. Easton, not against BPRI nor its Executive Director, the parties responsible if indeed there was any fraud.

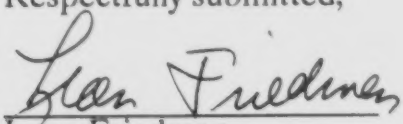
Such a disregard of the evidence in the proceedings below amounted to a serious due process violation. If the due process clause is violated when there is no evidence to support a criminal conviction, see *Thompson v. Louisville*, 362 U.S. 199 (196), the same must be true in a civil proceeding brought by the state.

CONCLUSION

This court should grant the writ to decide whether the doctrine of judicial estoppel is encompassed in the due process clause of the Fourteenth Amendment and prohibits state actors from taking inconsistent positions in two related or successive litigations and whether the due process clause was violated by the lack of evidence to support the judgment of the Appellate Division.

Dated: July 7, 1993

Respectfully submitted,



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APPENDIX A

APPENDIX A

ORDER OF NEW YORK COURT OF APPEALS DENYING MOTION FOR REARGUMENT OF MOTION FOR LEAVE TO APPEAL DATED APRIL 8, 1993

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the city of Albany on the eighth day of April 1993

PRESENT, HON. JUDITH S. KAYE, Chief Judge, presiding.

Mo. No. 213

The People of the State of New York, et al.,

Respondents,

v.

Brooklyn Psychosocial Rehabilitation Institute, et al.,

Appellants.

A motion for reargument to the Court of Appeals in the above cause and for consolidation having been heretofore made upon the part of the appellants herein, papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

APPENDIX B

APPENDIX B

ORDER OF NEW YORK COURT OF APPEALS DENYING LEAVE TO APPEAL DATED JANUARY 7, 1993

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the city of Albany on the seventh day of January A.D. 1993

PRESENT, HON. RICHARD D. SIMONS, Acting Chief Judge, presiding.

2-14 Mo. No. 1128

The People of the State of New York, et al.,

Respondent,

v.

Brooklyn Psychosocial Rehabilitation Institute, et al.,
Appellants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

APPENDIX C

APPENDIX C

ORDER OF APPELLATE DIVISION SECOND DEPARTMENT DENYING LEAVE TO APPEAL DATED SEPTEMBER 10, 1992

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

LAWRENCE J. BRACKEN, J.P.
CHARLES B. LAWRENCE
DAVID S. RITTER
JOHN COPERTINO, JJ.

91-06269, 91-10537, 92-04727

DECISION AND ORDER

The People of The State of New York, et al., Appellants, v. Brooklyn Psychosocial Rehabilitation Institute, et al., Respondents.

Motion by the respondents for leave to appeal to the Court of Appeals from an order of this court, dated July 6, 1992, which modifies two orders of the Supreme Court, Kings County, both dated May 6, 1991, and a judgement of the same court, dated June 5, 1991.

Upon the papers filed in support of the motions, and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

BRACKEN, J.P., LAWRENCE, RITTER and COPERTINO, JJ., concur.

ENTER

Martin H. Brownstein
Clerk
September 10, 1992

APPENDIX D

APPENDIX D

DECISION AND ORDER OF APPELLATE DIVISION SECOND DEPARTMENT DATED JULY 6, 1992

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

Argued - April 21, 1992

Decided - July 6, 1992

LAWRENCE J. BRACKEN, J.P.
CHARLES B. LAWRENCE
DAVID S. RITTER
JOHN COPERTINO, J.

91-06269
91-10537
92-04727

The People of The State of New York, et al., appellants, v. Brooklyn Psychosocial Rehabilitation Institute, et al., respondents.

Robert Abrams, Attorney-General, New York, N.Y. (Judith T. Kramer and Laurel W. Eisner of counsel), for appellants.

Sankel, Skurman & McCartin, New York, N.Y. (Joel Sankel, Enid Langbert, and Joan M. Markey of counsel), for respondents.

In an action, inter alia, to enjoin the defendants from operating certain mental health facilities and to recoup public and residents' funds allegedly misappropriated by the defendants through Medicaid and real estate fraud, the plaintiffs appeal from (1) an order of the Supreme Court, Kings County (Ventiera,

J.H.O.), dated May 6, 1991, which, after a nonjury trial, directed that the complaint be dismissed and severed the claims of the defendants 3 Lafayette Avenue Corporation and Cobble Hill Center Corporation to recover unpaid rent from a court-appointed receiver (2) an order of the same court, also dated May 6, 1991, which inter alia, added the receiver as a party to the severed action, directed that interest be added to the rent to be paid by the receiver, and directed that a postrial hearing be held on the issue of the market rental value of the facilities utilized by the receiver, and (3) a judgment of the same court, entered June 5, 1991, which dismissed the plaintiff's complaint in the original action.

ORDERED that the first order dated May 6, 1991, is modified by striking therefrom the provision directing a severance and the portion thereof which dismissed the complaint insofar as it is asserted against the defendant Karl Easton; as so modified, the first order dated May 6, 1991, is affirmed; and it is further.

ORDERED that the second order dated May 6, 1991, is modified, on the law, by deleting the third decretal paragraph thereof; as so modified, the second order dated May 6, 1991, is affirmed; and it is further,

ORDERED that the judgment is modified by (1) adding thereto a provision awarding judgment in favor of the plaintiffs and against the defendant Karl Easton in the principal sum of $7,573,703, representing the proceeds of Medicaid fraud and treble damages pursuant to Social Services Law § 145-b, (2) adding thereto a provision awarding judgment in favor of the defendant 3 Lafayette Avenue Corporation and Cobble Hill Center Corporation and against the receiver Federation Employment Guidance Service, in the principle sum of $38,708 and (3) adding to the first decretal paragraph thereof, after the phrase "hereby dismissed" the words "in all other respects"; as so modified, the judgment is affirmed; and it is further.

ORDERED that the plaintiffs are awarded one bill of costs payable by the defendant Karl Easton.

The evidence established that Dr. Karl Easton controlled the Brooklyn Psychosocial Rehabilitation Institute (hereinafter BPRI), a not-for-profit corporation, which offered services to the mentally ill. The Easton family also controlled BPRI's landlords, Cobble Hill Center Corporation (hereinafter CHCC) and 3 Lafayette Avenue Corporations (hereinafter 3LAC), which owned the premised leased to BPRI housing its two facilities. These facilities included: (1) the Boerum Hill Community Residence (hereinafter BH), a supervised community residence for mentally disabled person located at 50 Nevins Street, Brooklyn, which rented its premises from CCHC and housed 196 mentally disabled individuals, and (2) The Lafayette Center (hereinafter TLC) a continuing treatment outpatient program located some two blocks from BH at 3 Lafayette Avenue, and which leased its property from 3LAC. Also affiliated with BPRI and rented from CCHC were the "Satellite Apartments", located at 415, 417, and 419 State Street, Brooklyn, where resided less mentally disabled persons who were capable of some degree of independent living but still required intermittent supervision. These facilities were licensed by the New York State Office of Mental Health (hereinafter OMH), and were funded by both Medicaid and Social Security. In their complaint, the plaintiffs charged, inter alia, that Easton defrauded Medicaid by improperly billing for "home visits" that were either not reimbursable or not performed. Indeed, they alleged that in 1985, for example, 95% of all "home visits" reimbursed by Medicaid State-wide were paid to BPRI.

The instant action was commenced by service of summons and complaint on or about October 20, 1986. The trial consumed several days over a 10-month period. Following trial, J.H.O. Ventiera dismissed the complaint, while severing for a further hearing the claims for rent by the defendants 3LAC and CCHC against the court-appointed receiver, Federation

Employment Guidance Service (hereinafter FEGS), for the period from October 20, 1986, to April 19, 1988, when the State took title by condemnation. On August 2, 1991, the rent hearing was stayed by this court pending determination of the instant appeal.

We find that the plaintiffs carried by overwhelming evidence their burden of proving that the defendants fraudulently billed Medicaid for "home visits" that were not actually performed, as the patient-staff interactions reported as BPRI "home visits" did not satisfy the Medicaid regulations and guidelines.

A "home visits" to a psychiatric patient by a qualified member of a clinical facility is contemplated by the OMH regulations and guidelines to the rare event, to be provided in the patient's home environment when he is for some reason unable to attend the regular clinic or day treatment center. According to 14 NYCRR former 579.5(e) [effective Aug. 10, 1982, repealed Apr. 5, 1988]: "Services may be provided to patients at a location away form the [clinic] facility. Except for crisis services, the patients' treatment plan must include the location where off-site services shall be limited to assessment and treatment planning services, verbal therapies, medication therapy, crisis services, and case management services". A "home visit" is required to be at east 30 minutes in duration (14 NYCRR former 579.6[a][5]; [b][5]; [c][5] [effective Aug. 10, 1982, repealed Apr. 5, 1988]).

In late 1984 and early 1985, the defendant Dr. Easton initiated a new "home visit" policy BPRI, according to which every casual contact between any BPRI employee and a client occurring off the clinic premises was to be recorded in a log as a "home visit". The plaintiffs proved that the enormous quantity of "home visits" billed to Medicaid by BPRI between January 1985 and October 1986 was directly traceable to this new "home visit" policy. Thus, the plaintiff' witnesses testified that Easton insisted that all BPRI staff - including regular BH employees, whose ordinary

job it was to wake up the residents, interact with them, motivate them, etc. - enter each of their routine and casual contacts with patients as "home visits". The "home visits", as recorded in BPRI's "home visit logs" after December 1984, failed to conform to Medicaid's definition of "home visits" for the following reasons: (1) they were done routinely rather than when patients were temporarily homebound, (2) they were performed in BH, a residence facility (i.e., a regular work location) rather than at the patient's home, (3) they were performed by regular BH floor staff rather than by qualified clinical therapists, (4) they were casual social contacts rather than contacts for the purpose of providing therapeutic services, (5) they were not therapeutically "justified", (6) they were not documented, (7) their duration was not recorded, (8) they did not last (and could not be aggregated to) the requisite 30-minute minimum, and (9) each individual participating in a group activity was deemed to have had a "home visit", when a proper "home visit" was one-on-one. The record does not support the defendants' contention that there was no relationship between those "home visits" recorded on the "home visit logs" and those billed to Medicaid. "Home visits" which were recorded on the "home visit logs" were then reported on the work sheet of the case manager responsible for that patient, as if the case manager had performed the visit himself. Also entered on the case manager's worksheet were all of the other services and attentions paid to that case manager's patients for that week. When the case manager's work sheet was sent to billing, the result was that something was billed to Medicaid for every patient for every day, although the facility could not bill everything entered on its in-house sheets without being in conspicuous violation of the medicaid regulations. Thus, the evidence, at trial established that if a patient was recorded as spending a full day ("F"), for example, at the clinic, and that patient was recorded as having received one or more "home visits" (HVs") on the same day, the facility would bill Medicaid for an F rather that an HV.

Because there were, inevitable, more HVs entered on BPRI's home visit logs than were billed to Medicaid (since OMH regulations forbade more than one HV per day to the same patient), the defendants argued that they only billed "home visits" when the number of short contacts with a patient over the course of a day added up to a minimum of 30 minutes. Aside from the fact that - despite the Supreme Court's finding to the contrary - the regulations do not permit such an accumulation of home visit time, the plaintiffs' investigation showed that in some 72% of cases a "home visit" was traceable to one or no staff-to-client contact, while another 6% were undocumented.

The record thus reflects that between January 1985 and October 1986, through a scheme devised and implemented by Dr. Karl Easton, BPRI received $2,524,501 in public funds for "home visits" that did not qualify for reimbursement under the OMH regulations.

Social Services Law § 145-b places personal liability on any individual who "knowingly by means of false statement or representation or by deliberate concealment of any material fact" falsely obtains - public funds, "on behalf of himself or others". Where public welfare benefits are obtained fraudulently by an entity (e.g., BPRI), the individual supervising, overseeing, performing or conspiring to effectuate the fraudulent acts can be held personally responsible, and is liable for treble damages (see, State of New York v. Britt 141 AD2d 911; see also, United Stated v. Weiss, 914 F2d 1514, 1526, cert denied subnom Gleicher v. United States, US , 111 S. Ct. 2888; United States v. Brown, 763 F2d 984, 992, cert denied 474 US 905; Harvey-Cook v. Miroff, 120 AD2d 621; Harvey-Cook v. Steel, 124 AD2d 709, 710). It is clear from the trial testimony that Easton designed, supervised, and implemented BPRI's "home visit" billing fraud on Medicaid.

Moreover, the plaintiffs proved that this fraud inured to the benefit of Easton and his family. BPRI's

leases with Easton's realty corporations contained steep escalation clauses and leases were per se not negotiated at "arms length" as Department of Health (hereinafter DOH) sides of the bargaining cable, in his not-for-profit capacity as Medical Director of BPRI, and his for-profit role as ultimate owner of CHCC and 3LAC (see, Matter of Cantor v. Axelrod, 63 NY2d 965; Matter of White Plains Nursing Home v. Axelrod, 131 AD2d 24,25). Through Easton's de facto control of the two realty corporations, which were ostensibly owned by his children, the family was personally enriched when funds collected from the Medicaid fraud were paid in the form of grossly inflared rents.

In addition, because the leases were not negotiated at arms length, the court erred in determining that the so-called Medicaid "cap" did not apply to the rents during the receivership period. Mental Hygiene Law § 31.28(b)(4), which was patterned on the receivership statute of the DOH, Public Health Law § 2810 (2)(b) (see, L 1984, ch 863, Memorandum of Office of Mental Health) provides that if the leases to mental heath community residences were negotiated at arm's length, the rents contained therein would apply during a receivership period. If, on the other hand, they were not negotiated at arms length, the landlord is entitled to either the so-called Medicaid Public Health Law § 2810[2][b]). Since the leases were not negotiated arm's length, they should have been disregarded. Consequently, the medicaid amounts ("the amount which would be reimbursable to the facility under the medical assistance program for real property costs if each patient in the facility were a recipient of medical assistance" [Mental Hygiene Law § 31.28 (b)(4)]) should have been applied because they were lower than the stipulated "fair market rentals". By Hodgkins' computation, the Medicaid "cap" for both facilities together was $19,806 for 1986 and $18,902 for 1987.

We have considered the plaintiff's remaining contentions and find that the further relief sought is not warranted on the record of these proceedings.

BRACKEN, J.P., LAWRENCE RITTER and COPERTINIO, JJ., concur

APPENDIX E

APPENDIX E

MODIFIED JUDGMENT SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY DATED AUGUST 3, 1992

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF KINGS

PEOPLE OF THE STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Plaintiffs,

-against-

BROOKLYN PSYCHOSOCIAL REHABILITATION INSTITUTE, 3 LAFAYETTE AVENUE CORP., COBBLE HILL CENTER CORP., DR. KARL EASTON, JACQUALINE EASTON, IRVING LINK, THEODORE ROSTEN,

Defendants.
Index No. 29163/86

MODIFIED JUDGMENT
dated August 3, 1992

This action having come on for trial before the Hon. Carmine A. Ventiera, sitting without a jury, at a term of IAS Part 23 of this Court commencing on April 22, 1987 and counting to and until February 11, 1988, at the Courthouse thereof at 360 Adams Street, Brooklyn, New York 11201, and the parties having appeared by their respective attorneys and having presented their written and oral proofs, and

The Court having in a first written Order dated and entered on May 6, 1991 dismissed the complaint and severed the claims of 3 Lafayette Avenue corp. and Cobble Hill Center Corp. for rent pursuant to Mental Hygiene Law Section 31.28 (b) (4) and having directed that the rent would be determined in accordance with the memorandum decision of this Court dated November 7, 1990 and with a second Order of this Court dated and entered on May 1991, which Order set the matter down for a hearing; and the Court having directed entry of judgment for defendants dismissing the complaint without costs and disbursements, and said Judgment having been entered in this Court on June 5, 1991: and

Plaintiffs having filed Notices of Appeal of the first and second May 6, 1991 Orders of this Court on May 28, 1992, and plaintiffs having filled a Notice of Appeal of the June 5, 1991 Judgment dismissing the complaint on June 17, 1991, and plaintiffs' appeals having been consolidated by the Order of Appellate Division, Second Department dated December 13, 1991, and plaintiffs having perfected their appeal on December 17, 1991, and defendants having filed memoranda of law in response; and

The Appellate Division, Second Department having heard oral argument on April 21, 1992, and having issued a Decision and Order dated July 6, 1992, a) modifying the first May 6, 1991 Order by striking therefrom the provision directing a severance and the portion thereof which dismissed the complaint insofar as it is asserted against the defendant Karl Easton, and affirming the first Order as modified; b) modifying the second Order dated May 6, 1991, on the law, by deleting the third decretal paragraph, therein, which paragraph ordered a hearing on the amount of rent to the be paid to defendants 3 Lafayette Avenue Corporation and Cobble Hill Center Corporation; and c) modifying the Judgment dated June 5, 1991, by (i) adding thereto a provision awarding judgment in favor of the plaintiffs and against the defendant Karl Easton in the principal

sum of $ 7,573, 703, (ii) adding thereto a provision awarding judgment in favor of the defendants 3 Lafayette Avenue Corporation and Cobble Hill Center Corporation and against the receiver Federation Employment Guidance Services, in the principal sum of $38,708, and (iii) adding to the first decretal paragraph thereof, after the phrase "hereby is dismissed" the words "in all other respects," and (iv) affirming the judgment as so modified, and (v) granting the plaintiffs one bill of costs payable by the defendant Karl Easton.

NOW, upon motion of ROBERT ADAMS, Attorney General of the State of New York, attorney for plaintiffs herein, it is hereby

ADJUDGED that plaintiffs People of the State of New York, c/o Robert Abrams, Attorney General of the State of New York, 120 Broadway, New York, New York 10271, Room 24-26, New York State Office of Mental Health, located at 44 Holland Avenue, Albany, New York 12229, and New York State Department of Social Services, 40 N. Pearl Street, Albany, New York 12243 have judgment and do recover of the defendant Karl Easton, residing at 353 Park Avenue, New York, New York and RFD # 370, Martindale Road, Crary ville, New York in the town of Taghanic, New York, the principal sum of $ 7, 573, 703.00 plus costs and disbursements in the sum of $ 3, 682.40 making a total sum of $ 7, 577,385.00 and it is further

ADJUDGED that defendants Cobble Hill Center Corporation and 3 Lafayette Avenue Corporation, principal place of business located c/o Karl Easton, 535 Park Avenue, New York, New York have judgment and do recover of the receiver, Federation Employment Guidance ervice, principal place of business located on 114 Fifth Avenue, New York, New York 10011 the principal sum of $38,708.00; and it is further

ADJUDGED that the complaint is dismissed in all other respects.

/s/William A. Lenahan
Clerk

APPENDIX F

APPENDIX F

DECISION OF JUDICIAL HEARING OFFICER CARMINE A. VENTIERA DATED MAY 6, 1991

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF KINGS

PEOPLE OF THE STATE OF NEW YORK, THE NEW YORK STATE OFFICE OF MENTAL HEALTH, THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Plaintiffs,

-against-

BROOKLYN PSYCHOSOCIAL REHABILITATION INSTITUTE, 3 LAFAYETTE AVENUE. CORP., COBBLE HILL CENTER CORP., DR. KARL EASTON, JACQUALINE EASTON, IRVING LINK, THEODORE ROSTEN,

Defendants

By an order dated March 3, 1987 and one dated March 10, 1987, of Supreme Court Justice Gabriel M. Krausman, Carmine A. Ventiera a designated Judicial Hearing Officer was assigned to hear and determine all issues in the above-entitled matter.

Attached and annexed hereto is a list showing the abbreviations that have been used throughout the hearing and also in this memorandum.

In this action plaintiffs seek to enjoin the defendants from continuing to operate a mental health service facility in violation of law and regulations; to recover public and residents' funds which have been fraudulently and unlawfully misused; to dissolve the corporate defendants, namely, Boerum Hill Center Corp. (BHCC), and 3 Lafayette Avenue Corp. (3LAC); to recover on behalf of the residents of the facility, past and present public funds, including Social Security Disability Insurance and Supplemental Security Insurance, which defendants wrongfully withheld or improperly utilized; to recover on behalf of the State of New York, Medicaid funds improperly and fraudulently claimed by defendants for alleged "home visits" by defendants' employees.

Prior to and after the trial the defendants Brooklyn Psychosocial Rehabilitation Institute (BPRI), Irving Link and Theodore Rosten settled their actions with the plaintiff.

One of the claims here is that the defendant, Dr. Karl Easton, committed fraud in that he controlled the enterprises by having a conflict of interest as the Owner of the real properties that were used and also as the Executive Director and by being on the Board of Directors of BPRI. It is further claimed that Dr. Easton became extremely concerned about the lack of revenue and that the home visits were incorrectly billed to Medicaid; that the staff at the facilities were not qualified. It is further claimed that BHCC received payments made to its residents, as a result of which BHCC paid the rent to the real estate corporation.

The first witness called by the plaintiff was DONALD SCHWARTZ. He testified that he is a social worker and an administrator for the City of New York; he is a cousin of Irving Link, the Executive Director of BPRI (83). I believe that at the October 29, 1980 meeting Dr. Easton requested a leave of absence from his position as executive director (92). Mr. Schwartz

believes Dr. Easton attended executive meetings of the board. Board action was either discussed or voted on items that were presented on the agenda (93). Mr. Schwartz testified, Dr. Easton was present at the Board of Directors meeting; "I believe what was discussed (at the meeting) was simply that BPRI would approach the owners with regard to the potential purchase of the (3LAC) property" (96). "The Board in discussion of a proposed rental of Lafayette Center directed the Executive Director to seek estimates for the real property value of the Lafayette Center. The Board also at another meeting directed the Executive Director to renegotiate the lease for the Nevins Street property." (120)

Mr. Schwartz was elected to the Board of Directors April 1930 (121). The first meeting of the Board that I attended was October 29, 1980 (127). The minutes were read and approved at the next meeting pursuant to normal board guidelines (128, 129); the financial statements were reviewed at the various board meetings. There was a special Board of Directors Executive Committee Meeting on October 13, 1981, where Dr. Easton officially resigned after the one year leave of absence (129). During my period as a member of the Board of Directors Dr. Easton became a board member and remained for two years as a voting member, during which time he received no salary as a board member (130). No board member received a salary or stipend as a member of the board and Dr. Easton did not receive a salary as an employee when he was a member of the Board of Directors (131).

I never discussed on the telephone with Dr. Easton the affairs of BPRI. I had communications with State or Governmental agencies on behalf of BPRI, I believe it was the State Department of Mental Health (131) which followed the inspection and report by the Office of Mental Health (OMH) (131) regarding BPRI (132). I never had any business dealings with Dr. Easton before I went on the Board, nor did I have any while I

was on the Board. I was not given any money by the real estate corporations (133).

The Board wanted to approach the owners to discuss the potential purchase of the Lafayette Center property, which was discussed at the board meeting. The Board requested the Executive Director seek fair market value appraisals, one was done (134). I do not believe that the discussion between BPRI and the real estate corporation that owned the property ever reach a price. Subsequently, it appeared to be deferred. I believe the audit and the recertification process were more dominant and therefor the discussions of purchase was (135) delayed (136).

A Medicaid audit was conducted about billing for home visits by the State Department of Social Services. This was discussed at the board meetings in 198l, which audit was still on in 1984 (136). The board voted to retain counsel to oppose the determination of a debt of $83,000 by the State Department (137). There was refunded to the State the SS, $13,300 (137) negotiated by our lawyer (138).

WALTER SAURACK, called as a witness for the plaintiff testified in part, that he is employed by the New York State Commission on Quality of Care for the Mentally Disabled (CQC) (191), an agency that oversees the Department of Mental Hygiene for State operated facilities, and facilities that function under a license issued by the State of New York or the Department of Mental Hygiene 192). The Commission has the responsibilities to review patients debts, to review the quality of care in state institutions, and institutes licensed by the Department of Mental Hygiene that run programs in Community residence or in other (193) types of facilities. He is a college graduate with a Degree of Bachelor of Business Administration, majoring in Accounting, and M.S. Degrees in Administration and Management (196); has worked with the CQC eight years; he is the Director of Facilities Investigations and Cost Effectiveness; my responsibilities are to conduct

investigations, fiscal audits, and to do cost effectiveness or efficiency type studies to see whether or not funds are being spent for mental hygiene purposes are reasonable, necessary, and whether or not they are related to client care. I have done, including this one, four or five major financial investigations (198).

Our investigation is on-going (203). We reviewed the Board of Directors minutes, records, accounting ledgers and information related to Medicaid billings (214). We (my staff) interviewed Irving Link, Executive Director of BPRI; Dr. Karl Easton, who was the Medical Director and ex officio board member (214); Theodore Rosten, CPA; Counsel Stavis, and John Rybalstowski. My staff interviewed eight or ten individuals, individual bookkeepers; reviewed documents of 3LAC; spoke to staff members (215; reviewed documents of BHCC; reviewed leases of Boerum Hill Residence and Lafayette Center (217). Mr. Saurack investigated the corporate background of the not-for-profit BPRI; reviewed the incorporation records of the two real estate corporations (321); reviewed the applications for operating certificates sent to OMH including the letters from Dr. Easton sent to OMH. We talked to Dr. Easton at Boerum Hill Residence; interviewed Mr. Ackerman, Dr. Easton's personal accountant in Hudson, New York; interviewed BPRI accountant Theodore Rosten (322). Mr. Saurack learned that the real estate corporations and the pre-existing corporations were all owned by the Easton family (324). Dr. Easton was President of the two realty (353) corporations that held the lease on BHCC property, his children owned the corporation (354). The cost of the properties purchased by Dr. Easton and his family was $450,000 for the Boerum Hill Residence at 50 Nevins Street which (815) included the Satellite Apartments, State Street; the continuing treatment property 3LAC was acquired for $150,000 (B16).

Mr. Saurack testified that 3LAC was appraised by an appraiser retained by BPRI in January 1986 for $690,000, indicating a capital gain to the Easton family

of $540,000 (835); and that BPRI is funded by Social Security income and Medicaid payments (847).

On cross-examination Mr. Saurack said he never talked to any of the membership of the Board of Directors (858/9), and that his notes indicate that approval was given by the Board of Directors at the December 12, 1982 meeting to buy 3LAC building (1229).

SUSAN LALLY, called as a witness by the plaintiff, has a B.A. degree from City University of New York received in 1975, and a M.S.W. from Hunter School of Social Work in 1978. She testified she had field placement studies, which is a required aspect of social work; the first placement employment was at Boerum Hill Rehabilitation Residence for nine months through 1977 where she worked with chronically mentally ill patients as a case worker, her supervisor was Irving Link, and his supervisor was Dr. Easton (1226). She completed a field supervisor course in case management and organizational theory and clinical supervision at Hunter College School of Social Work (1227). Among positions she held in her field was with BPRI from 1983 to 1985, in addition she had supervisory responsibilities for graduate field workers and professional staff that worked in the Community Residence in the day treatment (3LAC) program and State Street Apartments (1228). Her current position is with New York State Office of Mental Health (1229).

Ms. Lally heard the term home visit through her employ mend at 3LAC; she heard it with greater emphasis in 1984, 1985 (1233); she heard about home visiting policy at staff and team meetings attended by Dr. Easton. Dr. Easton chaired the meetings. Staff who had responsibility for clients met in a group to discuss issues. At those meetings Dr. Easton was present and stated a policy that there would be daily home visits for every client residing in Boerum Hill (1234). There was some discussion as to what constituted a home visit, what was eligible for billing, and about circumstances where

clients didn't need that much contact, and what was clinically justified in (1235) terms of providing the service on a daily basis. Dr. Easton gave several reasons for why there should be daily visits, including that we don't have a contact with the New York State Office of Mental Health so we need the revenue. We are already providing the service, so we should be recouping the appropriate money from Medicaid for providing it. That was the gist of those discussions. A policy was discussed in the Tuesday clinical meetings where Dr. Easton was the chairperson or the person conducting the meetings (1236). He reviewed case manager work sheets and continued to reiterate that he expected a daily home visit for all the clients residing in Boerum Hill (1237). Dr. Easton said, there should be a daily home visit for every client resident at Boerum Hill, to the best of my recollection (1288). I believe, it was said that a clinical justification should be documented in the treatment plans (1289). The first time I heard the words home visit at BPRI was probably the first week or two I was on the job, in 1983 (1292). Dr. Easton's philosophy of psychosocial rehabilitation was that staff should have regular and on-going contacts with the clients of the agency (1293). Initially he stated a policy of daily home visits for State Street; he added daily home visits for the Satellite apartments. When that proved undoable due to the amount of hours it would take and transportation and people's responsibility in the continuing treatment program, he reduced that to three times a week. The case managers work sheet had printed thereon that (home visits) should be for thirty minutes and that for a full day five hours (1300H), the rates were also there (1300I).

Under re-cross Ms. Lally testified that her particular team was David Ellis, Hannah Wegl, Ann Shirley, Diane Zuero, and the latter part of my stay Janet Gordon and David Kuzzann, that was the team that couldn't meet without Dr. Easton being present: (1300/OO). After I left the staff started to meet without Dr. Easton being present (1300VV).

PETER YEE, called as a witness by the plaintiffs, has a B.A. degree in Urban Studies majoring in Sociology and Social Control (1302). Mr. Yee was employed by BPRI (1303) in December 1983 as the fifth floor manager, continuing to the present (1304). He is familiar with home visits, I gained experience at BPRI. I was asked to help implement the home visit program in December 1984 (1306) by Dr. Easton and Connie Newman. As a case manager I conducted and recorded home visits on the case manager work sheet starting from December 1983. Dr. Easton discussed home visits at Wednesday staff meetings. That was basically launched in December of 1984, and Dr. Easton also talked about it at his team meetings for a few months after that (1307). There were team meetings on Tuesday afternoons at which Dr. Easton saw the teams and talked to us about different issues. My team consisted of Margo Rabner, Robert Casam, Barnetta Grayson and myself. The whole staff of BPRI would attend staff meetings chaired by Irving Link. There were special meetings where special issues were discussed (1308). Dr. Easton came to several meetings the end of 1984 and the beginning Of 1985, where he discussed home visits and the need for the home visits to be implemented to help our agency to secure additional funding. At a team meeting, the end of 1984, Dr. Easton informally mentioned that maybe I could help implement a program where we could collect and bill for all the services that we were doing but not being billed for, and officially I was asked the next day at a Wednesday staff meeting by Connie Newman and Dr. Easton to carry out this new home visit policy. Dr. Easton mentioned at team meetings it was a face-to-face contact by staff to residents (1309). The concrete thing that Dr. Easton emphasized was face-to-face contact, and there were questions asked by staff: what consists of a home visit, recording at home visits and billing of home visits. Dr. Easton mentioned that contacts, casual contacts, like riding in an elevator and exchanging greetings in the lobby would be recorded as home visits and a minimum one recording would be billed as home visit (1310). Dr. Easton said that TLC was losing money and if the

agency does not come up with additional source of funding, the agency would insolvent in a few months and we must find ways to increase the revenue, and the best way to do it is to increase our home visit billings and document all the services that were performed, but was not billed for up to that time. He mentioned that home visits should be increased to serve this purpose (1320). It was the next day, which was a Wednesday; Dr. Easton came into the staff meeting and basically told the whole staff the same situation of TLC losing money and we must increase our home visit billing, and went on to expend how we are going to do it, and asked us or asked me to help implement this new home-visit policy (1321). I discussed it with the doctor on how and what, on the documentation of our services and expanding the home visit. A new sheet was developed through our discussion, which eventually was used as the home-visit documentation sheet; and the home visit was also discussed at Tuesday team meetings (1322). The purpose of my meeting with the doctor was to find a way to simplify documentation on the contacts made by staff to residents (1324).

We consolidated the remotivation sheets with another form of contact sheet to make the home-visit log, and two or three discussions were held before the final draft was created. Dr. Easton came up with an initial draft and we discussed the design and the complexity of it and then the final draft was formulated through that (1324). Dr. Easton, when the initial draft came back, I had a question of should we include a block for time, and Dr. Easton said it was not necessary to include a block for time; we also made changes on how many lines per person was included in the sheet (1325). No, there was no discussion or slot for time in the home-visit log (1326). Home-visit log was used in the following manner. All contacts were recorded in the home-visit log during the remotivation time in the (1327) morning and afternoon, and any contact by any staff as to any resident during the course of the day (1328). I recorded on a case manager work sheet home visits if there were a minimum of one entry on a home

visit log (1329). Dr. Easton answered that any contact with residents at Boerum Hill should be entered in a home-visit log. He gave the example of exchanging greeting and information across the lobby or exchanging information or greeting going up in an elevator. And he also answered that if there was one entry on home-visit log, that should be billed in the case manager work sheet (1333). Mr. Yee stated his signature appears on the home-visit log where it says "TLC staff assigned" right next to room 520, Column A 524, Column A. Mr. Yee then lists eighteen other places (1339/40).

Under cross-examination he testified, Dr. Easton has always maintained that the cure for schizophrenia is to keep residents or patients active and a way of doing that is to contact and keep them busy and keep them occupied instead of -- versus isolating themselves, which is a major cause of a lot of delusions and symptoms of schizophrenia (1364).

To the question --

> "Q Dr. Easton never said that any contact between staff and residents should be billed, did he?
>
> "A Dr. Easton never used those words" (1374)

I billed "for three people each week" (1375). It was told to the staff by Mr. Link that home visits should be billed only for time in excess of thirty (30) minutes (1391/92). I went into an office; I took out the home-visit log for the week; I took out the Boerum Hill group writeups for the week and I would look for entries beside my caseload of names. If I see a minimum one entry I would put a home visit billing on the case manager work sheet for that person for that day (1404).

On October 20, I went to Ms. Winter's room in the morning to remind her that it's time to get up to go to her morning program. Brunetta Grayson also saw her

in the afternoon (1416). She was having problems, I spent probably on the average anywhere from 40 minutes to an hour daily (1419).

Dr. Easton never told me that the time had to total 30 minutes in order to be a billable home visit (1433, 1440). I would spend the majority of my time at BH over the course of a week approximately 80 to 85 percent (1441). The 30 minutes question came up from the time and we were told by Dr. Easton .... that a cumulative nature of the time would be sufficient to satisfy the criteria (1446). I don't think Dr. Easton said cumulative (1449).

The Judicial Hearing Officer finds from Mr. Yee's testimony that Dr. Easton desire was to increase his billable home visits. Mr. Yee submitted the name of a client where more than 30 minutes was spent in a face-to-face contact between staff (Mr. Yee) and his patient to whom he provided a home visit over a twenty-four hour period (Guidelines of OMH Section 2.3; 2.4; 2.5; 1, 2, 3; 4.3; Part 579 of the MHL).

Charts of patients that were reviewed by psychiatrist witnesses were numbered (62A) and letters (AB) were used to protect the identity of the patient. The charts were those in Boerum Hill (BH) and patients attending the Lafayette Center (TLC), a continuing treatment center.

The plaintiffs called two psychiatrists, the defendants called one psychiatrist as witnesses with respect to the charts. The first witness called by plaintiffs was Dr. Francine Cournos, a psychiatric consultant for the Office of Mental Health (OMH Regional Office), where she assesses medical policies, reviews incidents that occur in
State institutions and in State programs certified by the OMH.

The doctor's testimony and conclusions relating to each chart is set forth in the chart number.

CHART 62B - TB - No.34 on the list

Mr. Cohen, counsel for defendants stated that the chart was not in court (2206).

CHART 62C - TB - No.35 on the list

Dr. Cournos testified -- this part of the chart that she reviewed was not the full record.

CHART 62E - NO. 37 on the list -- LAC Chart

Dr. Cournos' testimony is that one of the goals of treatment is to prevent serious decompensation to prevent hospitalization. This patient was hospitalized twice in 1970 (2217), once after my review of the chart. There is no evidence o avert decompensation and hospitalization (2218). After hospitalization and return to facility notes were made as to what happened that led to hospitalization and what will be done to prevent it. This is lacking (2218); the full file was not in court. The TLC chart has no mental or psychiatric input, goals and treatment plan and no specific steps to achieve them. It is my testimony that some of the goals were not appropriate. This patient in the period of time I reviewed it decompensated twice (2230). The chart does not adequately reflect any response to the hospitalization or to the discharge or any correction in the treatment plan to avoid future hospitalization, which a person is undergoing a decompensation there should be notes written as often as is necessary to document (2231) any changes, that is often every single day, whether he is going uphill or downhill, whether anything you are doing is leading to stabilization (2232). Discharge summaries from last hospitalization should be part of the chart. There is nothing in this chart (2234). The doctor testified that white-outs should not be used in charts (2246).

CHART 62F - WG

Dr. Cournos reviewed chart in March 1985. The chart contains extensive white-outs. I will start with the TLC chart. It's on the activity schedule, 7/15/86 (2255) and 10/4/85, in treatment plan 1/15/85 in a semi-monthly report 1/28/86, in initial report 3/14/84, in progress note August 1984 or BH chart, progress notes (2257). The doctor rendered a report to NYS OMH (2258). There should be documentation with outside providers (2259) not enough (2260).

CHART 62G - No 39 on the list

Nothing reported.

CHART 62H - JD- No. 4 on the list -TLC Chart (2263)

It is the complete chart I reviewed, there is no psychiatric assessment, no evidence on ongoing psychiatric monitoring or management. It contains goals for which the steps are vague, for example "control anger", it says "counseling and home visits". It is not clear how counseling and home visits would control the anger. There is use of white-outs in the chart. In my opinion as an expert, HV is not an appropriate response to anger (2264), giving reasons (2265).

CHART 62 - MR - No. 42 on the list - BH and TLC Charts (2287)

Dr. Cournos reviewed the chart in March 1985. It is the full chart. I reviewed the chart a few weeks ago (2287). This patient had his medication reduced without any rationale in the chart. A note in the chart says "Meds, none. Took self off." It's in the July 1984 (2288) BH progress note. The patient had two hospitalizations in October 1984. He eloped from the hospital. On November 9 he showed up at BH and he was discharged without plans for the future. The progress notes are brief and inadequate (2289). Dr. Cournos made a finding "That the therapist providing treatment was not being supervised by somebody with more experience ". "As required by regulation." (2303) Dr. Cournos made a

finding for the need to provide alternative service when someone is discharged is in Regulation 585. 14c10. (2304). White-outs were in the progress notes of July 1984 (2306).

CHART 62I - LJ - No. 41 on the list

It is the complete record of BH and TLC I reviewed in March 1985. This is another patient who had two hospitalizations in the period of time I reviewed without proper medical intervention, without any attempt to stabilize the patient before it required hospitalization, without documentation of decompensation, without proper cut response to the discharge and a plan to (2266) avoid hospitalization in the future without an attempt to address the patient NONCOMPLIANCE with medication. This patient may have been potentially dangerous without an adequate response to the danger. There are gaps in the progress notes (2267). Note of 3/1/84 says "Agitated, anxious, easily over-stimulated, preoccupied with issues of violence, and his own sense of vulnerability" (2267). The doctor stated "at the time I reviewed the chart the progress notes were missing in the TLC record, which are now here" (2274).

CHART 62K - DL - No. 43 on the list (2307)

Dr. Cornish reviewed the two charts in March 1985. The TLC record doesn't appear to be here (2308). This is the 13ll chart (2309). There is no psychiatric or medical input; the progress notes are brief and repetitions; in a community residence a progress note needs to be written every month of how The patient is doing in the living situation and to their overall (2310) well being. These notes do not give sufficient information to draw adequate conclusions about this (2311). The doctor made no further findings regarding this chart. The TLC chart was found. No questions by Miss Tepper (2365).

CHART 62L - PM - No. 44 on the list (2312) TLC Chart

Dr. Cornish testified -- there is no psychiatric assessment as in the TLC chart, no ongoing notes by any physician about medical or psychiatric problem (2314); the doctor stated it implied in the regulation (2315). There was white-outs in many places in this chart, the places are set forth in the record (2316/7). The doctor's report marked plaintiff's exhibit 63 in evidence (2323). White-out dates are continued in the TLC chart (2325). In the BH chart there are white-outs in the monthly goals of March 8, 1985 (2326). This patient has numerous notes in both charts, was wandering the street and collecting objects which was considered dangerous to herself and other people (2327). The treatment according to the doctor was inadequate, it did not adequately address what a danger she was (2323).

The doctor stated that in a progress note it states, She still wanders at night" but there is no further statement as to what might be done to stop the wandering (2333). She's on no medication; there is no psychiatric explanation of her behavior, and there is no plan to address her wandering (2334).

CHART 62M - JO - No. 45 on the list - TLC Chart - BH Chart, the first volume is not here.

I reviewed the TLC chart and the first volume of BH in March 1985 (2335). My findings, there is an outside provider of medication in this case. There was very little evidence of communication (2336); there should be frequent communication to get some sense of how the patient is doing according to the psychiatrist; monthly is what I would consider optimal unless the patient was in crisis. In crisis you might feel even daily contact was necessary (2317). BH Chart 62M is the complete chart I reviewed in March 1985. The doctor stated I have nothing more to add (2339).

CHART 62 N - BP - No. 46 on the list (2338)

Dr. Cornish reviewed charts March 1985 and again the last few weeks (2340). The doctors opinion that this

patient was in the program from August 1984 until January 1986; the patient had four relapses and rehospitalized in the course of her stay at BH and TLC. Her treatment terminated at BH when the police evicted her, threatening arrest for criminal trespass (2341); is in the BH discharge summary (2344). "The patient was taken off all medication noncompliance" (2345). The patient was taken off all medication due to side effects. There was no discussion in the chart of how to address the problem of a very ill patient who appears to need medication but having problems taking it, which is especially important during higher risk period after discharge from the hospital (2346). What would have been appropriate would have been careful attention to the precipitating problems that led to her decompensation as well as an attempt to elicit her cooperation with medication, to try to prevent these relapses (2346).

CHART 62-O - FR - No. 47 on the list

Dr. Cornish testified she did not have separate comments on this particular one (2351). This is not the complete chart. I reviewed it in March 1985. This is the TLC record as of July 15, 1985; there is no BH chart.

CHART 62P - BS - No. 25 on the list

Dr. Cornish reviewed this chart March 1985 and within the last few weeks. This patient was hospitalized in May 1983. She went off medication in August 1983. In October 1983 she became depressed and withdrawn. No notes of psychiatric or medical intervention at BH or TLC program. She was hospitalized in November 1983. She went off medication again in April 1984 (2353). She was rehospitalized again in October 1984. The medication was discontinued by Dr. Easton in November 1984. In a semi-monthly note in TLC record dated 11/15/84 under a section called "Changes in Treatment Plan, no medication, as prescribed by Dr Karl Easton. Psychiatric consultation 11/13/84. " In December 1984 patient was noted not to be doing well

and she had become withdrawn. In February 1985, she was doing worse still (2354). An attempt was made to restart medication but she was refusing. She was hospitalized in February 1985; she returned in March 1985, the medication was again discontinued with the exception of medication for side effects. It was noted in March 1985 that the patient had a fear of going off medication. Dr. Cornish could not find that particular statement (2355). The doctor said "A determination should be made as to whether the patient needs the medicine or not." (2356)

CHART 62Q - AS - No. 48 on the list (2357) - TLC Chart

Dr. Cornish reviewed it in March 1985 and again in the last few weeks (2358). The patient is on no medication. He has been hallucinating since October 1984. Through HV the patient has been partially successful in defusing the power of the hallucination. The doctor stated "It is (HV) not a treatment of or response to hallucinating, daily home visits. They bear no relationship in one another" (2359). In the treatment plan dated 3/24/86 of the TLC chart, the patient is quoted "Sometimes I am paranoid and hear voices which unbalances my emotional state. I feel I have been functioning okay but it's been difficult at times." On the semi-monthly report of 4/7/86 it says Home Visit on 3/28, for receiving note of desperation, parenthesis, which he took back, re voices, verbal therapy provided" and in a separate (2360) handwriting different from the previous handwriting it says "in order to provide support and help Anthony cope with the stress he is undergoing" (2361). The doctor testified "No, in my opinion, no, it is not (2363).

CHART 62A - IB (2189) No. 33 on the list

This is a Lafayette Center chart. Dr. Cornish testified the chart was one she reviewed March 1985. Her testimony in part was that the chart had no medical input, no psychiatric assessment; no mental status

examination; no evidence of a physicians oversight and supervision of the case. Basically, there is an absence of medical and psychiatric management. While goals are repeatedly listed on the treatment plans the means of obtaining them are never specified in a way (2197) to understand what steps the program will take to get there (2198). There must be a comment on the nature of the psychiatric problems of the patient and his medical problems. Psychiatric assessment is in Section 585.14 of the Mental Health Law (MHL) and is a charting requirement (2201). The statute calls the chart a patient's record (2205).

CHART 62D - SD - No. 36, on the list (2209)

This TLC chart is full BH chart is not, it goes to 1984 (2210). Dr. Cornish' testimony indicates it does not have psychiatric input, no mental status, no physician notes, no documentation of medical or psychiatric assessment. There are goals (22II), steps to achieve them are vague. It is necessary for charts to contain a medical assessment (2212). The doctor stated we always try to get the person to come into the program, when all things fail, then we go out to the home (2540); its very difficult to provide treatment in the patient's home. It's very important for the person to come to the premises to get their treatment there (2541). There needed to be documentation of the daily progress of the patient (2542). Dr. Cornish did not look at the HV logs as to this individual (2542).

BEATRICE BRAUN was called as a witness by the plaintiffs. She is a Board Certified Psychiatrist (3435/6). She testified, in substance, she was familiar with continuing treatments programs (3437); and home visits (HV) (3438); and Section 579 and 585 of the Regulations (3439). She is familiar with psychiatric assessments (3471) which is usually done by a psychiatrist (13474/5), and progress notes (3475), and the facilities of UPRI (3476). She reviewed the charts of BH and the Lafayette Center (3480), the policy procedure manual (3482), the role of a medical director

(3486). She testified that from notes made in a chart she can formulate an opinion as to the quality of care (3487) that a patient receives. In her opinion there was not enough psychiatric involvement of what was going on (3489) in each facility. The quality of the charts in the proceeding were very poor; the charts were not anywhere nearly (3489) up to date or properly used (3490), medical data was missing (3491). She testified it was the medical director's responsibility to prescribe medication for the patients they are taking care of. If a psychiatrist was not prescribing medications correctly, it was the medical director's duty to talk to the psychiatrist and tell him how he felt it should be done (3494), there is a constant review of what is going on with medication, the order should be in writing.

The doctor's comments and opinion of the chart will be hereinafter set forth under the chart number.

CHART NO. 64A - RA

I saw BH and the TLC charts in December 1986 (3499). The TLC chart is inadequate (3508). The third chart here was adequate psychiatric monitoring; the psychiatrist refused to see patient because he refused to take his medication (3614); client had problems, this required closer monitoring than I found in the charts (3623). There is a note in chart on 3/12/85 that there was treatment plan, it might be signed by Dr. Easton (3626), it says psychiatrist review and there is a signature, it was signed 3/25/85 (3627). I don't see an adequate psychiatric assessment (3509). It indicated that the patient was frequently rehospitalized after medication was decreased (3510). There aren't any progress notes. The treatment plans are here (3512). This patient was not closely monitored psychiatrically. Medication was reduced too rapidly and the patient had to be hospitalized (3530). I do not think a patient should be evaluated, in front of another patient. Because there is a confidentiality issue involved in this (3537). Usually as far as evaluating the patient is concerned, that's usually done by whoever is there (3542), primary therapist and

usually the psychiatrist would ordinarily see the patient alone.

Under cross-examination Dr. Braun testified, this patient was hospitalized three times in 1983 (3620) and three times in Beth Israel Hospital (3620) between 11/83 through 1/2/85 (3621). There is noted in the chart medication compliance and this would call for very much closer monitoring that I found in the chart. As I say, the only note that I found was that he was refused to be seen (3623). There is a semi-monthly note that says he was taken off medication via consultation with Dr. Easton. And yet there are other indications that he was being medicated from an outside clinic. The references back and forth between the organizations is very poor (3624). This patient was taking lithium and I say ". . . lithium levels must be done regularly and they should have been in this chart. Dr. Braun's attention was called to the (the patient) stated he hasn't had his lithium level checked recently and a recommendation for this blood check is being made." Dr. Braun responded, "this particular one, yes" (3629). It was the result of a consultation of Dr. Easton and the community team that there was a need for blood level check for lithium levels (3628). Dr. Braun then stated, I don't see the results of this lithium level. I see that was recommended" (3629). The treating psychiatrist were from Beth Israel. Very shortly after there are notes that Dr. Easton was changing medication (3630). Dr. Braun testified, tihere has to be an indication that the physical examination has been done or a reason as to why it was not done. The doctor was then referred to something in the chart by Hr. Cohen, counsel for defendants, which was from Fulton Medical Clinic that was apparently signed by a doctor. Dr. Braun said, "This is not a physical examination" then she stated, it was the "Report of medical examination" (3631). The note on 7/22/86 that the Brooklyn Psychiatric Center psychiatrist stopped seeing this patient due to his refusal to follow through on medication (3652). Dr. Charner seems to be (3652) the one from Brooklyn Psychiatric. The patient was taken off medicines via a consultation with Dr. Easton (3653). Due to this patient's anger

about his medication be has decided to begin psychiatric treatment at Brooklyn Center for Psychotherapy (3659). On 10/14/86 this patient failed to show for an appointment. On 10/15/86 he was hospitalized (3661). In the 1/15/86 treatment plan it states, R believes that his only problem is that he is on so much medication. He states he cannot study for school due to medication. That is a very common statement from patients on medication. If you take them off, they are going to be hospitalized (3663). The chart reflects the input of at least 5 or 6 psychiatrists at various facilities involving this patient. I think the reason this patient was put in a community residence and a day program was to get him to take his medication (3664).

Dr. Brochner a psychiatrist at Beth Israel Hospital was giving the medication. On 4/2/85 there was a meeting with Dr. Easton (3634) and the staff concerning this patient (3635). Dr. Easton lowered the medication (3636). On 7/3/85 there was a consultation between Dr. Easton and Dr. Schiff, the third floor team, for an evaluation upon re-admission from Beth Israel (3643). Robert was oriented, made good contact, mood stable no gross psychotic symptoms. Medication will be re-evaluated in four weeks and it has a listing of the medicines; it was signed by Dr. Schiff and Dr. Easton. On 9/12/85 there was a consultation with Dr. Ambrose at BPRI which resulted in a re-evaluation of the medication; he was attending the program regularly (3644). To help maintain contact on 9/27 there was another consultation regarding reading of present lithium levels. On 10/8/85 there was a consultation with the Brooklyn Center of Psychotherapy with a staff member of BPRI (3645). The patient decided to go to Brooklyn Center for treatment (3646). The semi-monthly report from 5/15/85 shows "Taken off medicines via consultation with Dr. Easton," this note is from BH chart (3650). On June 24, 1986, there was a consult between Beth Israel and Ms. Rivera at BPRI, while the patient was in the hospital (3651). On 7/22/86 the Brooklyn Psychiatric Center, Dr. Cherner, was seeing the patient due to his (patient) refusal to follow

through on medication (3652). This patient failed to show up for his appointment with Dr. Lucik at BH on 10/14/86; he was taken to Beth Israel Hospital on 10/15/86 (3661). In the 10/15/86 treatment plan this patient stated he believes that his only problem is that he is on so much medication; he cannot study for school due to medication (3663). Dr. Cherner at the Brooklyn Center for Psychotherapy lowered his patient's medication (3666). I spoke very little to any of the staff at either institution (3682). I didn't talk to any of the patients; nor did I talk to any of the individuals who were involved in his treatment at BPRI (3683). This patient signed a consent form as part of the agreement "I understand that I am not compelled to take medication and that I may decide to stop taking it at any time" (3684). The court notes that Dr. Braun gave testimony only on one chart - Chart No. 62A and no other chart.

The defendants called as their witness DR. MARK P. NOVICK, a psychiatrist. The following is the testimony in part of Dr. Novick. I reviewed in the neighborhood of twenty (20) (3790) charts, maybe a few more. The purpose of medical charts is a device to record as best as possible what a staff is doing with a particular individual who participates in that program (3791). It is also a legal regulation, a legal document mandated in law to include certain items as authorized in law, part 185 of the statute, part 583 of the statute. Boerum Hill is not a continuing treatment program. It is a residence (3791) the requirements differ. Section 586 is for the operation of a community residence (3792). I visited BH a couple of years ago. I saw what the rooms looked like, what the facilities looked like, saw a number of patients there. I have referred patients to BH; I have worked (3795) with a social worker who made the referrals, it might have been at my suggestion to use BH as a facility for such a patient (3796).

CHART 62A - SB - Lafayette Center Chart (3803)

I reviewed this chart and found psychiatric assessment (3804); the assessment of treatment plans is on the

intake, includes mental status, Item #7 (3805). There are several consultations with different psychiatrists who have been consulted regarding this patient (3806). Goals listed, treatment listed (3807), there seems to be an interest in the patient's well being (3808). I did not feel the chart was inadequate or incomplete (3809). According to the statute (reviewed 585.14); the chart seems to be in compliance with the charting requirements (3809). They are TLC charts, are adequate and meet the requirements of the statute as well as reflected an interest in and caring quality towards each individual described in the chart (3811). It is true for Chart 62A - SO.

CHART 62D- SW (3811) - TLC CHART

TLC Chart from Brooklyn State Hospital; he was admitted 11/26/73 to BH and TLC -- psychiatric assessment and mental status at that time (3813). I have not seen any material from 1973 to 1982. There are regular ongoing treatment plans, one dated 6/15 thru 7/28, reviewed by Dr. Easton as well as the clinical team; another 1/2/86 appear on a regular basis because the statute requires it to be done semi-annually. The charts meet the requirements of the statute for completeness as defined by 585 (3815) -- an excellent chart. I feel they done an adequate job in recording this chart (3816).

CHART 62E - JE (3816) - TLC Chart

Patient followed by a Dr. Michael at Brooklyn Center for Psychotherapy (3816), receiving treatment at Lafayette Center there are several treatment plans in here -- I felt treatment plans were well written and adequate; found medical and psychiatric input for this patient by TLC -- number of consults reports go back a long period of time (3817). There are quite a number of them. Patient was quite noncompliant with his taking of medication; considerable difficulties in his management (3819), part of reason why he would decompensate (3819) on the TLC admission form,

hospitalized three times within the last year at Maimonides Hospital; complete psychiatric report referring him to TLC. The chart is complete insofar as it meets the requirements of the statute, Section 585. It is adequate in terms of what is happening to the patient (3819). I have no problem with believing that he obtained good care (3920). That is true of all the charts that I was asked to review (3820). I saw a couple of instances of white-outs. It seemed the person made a minor error and simply tried to correct it (3821). I don't think it changed the record in any way substantially or indicated any attempts to deceive or cancel any essential facts about the individual (3821). As long as they (charts) conform to statute they may organize it in any way they see fit (3823); explains batches of papers clipped together. The chart appears to follow a consistent format of BH and TLC (3824). I have asked someone to make notes for me (3825).

CHART 62F - WG - TLC Chart

This patient is being treated at Beth Israel Hospital, not at TLC. The admission form is in a way a psychiatric assessment came from here (3828). The treatment plan are quotes detailed and extensive in description of the individual (3829) treatment plan, 7/15/85 is signed by Dr. Easton (3830). I find this chart complete and adequate from reading the chart. I find that he was receiving excellent care at Lafayette Center (3831).

CHART 62H - JH - TLC Chart

I found it complete and adequate, it conforms to regulations (3835) and 585 of Mental Hygiene Law; it contained psychiatric assessment in chart (3836) goals are well spelled out (3837), the care appears to be adequate and relevant to patient's need (3838); patient has benefited from daily contacts. There is no particular person who performs the HV (3848); its probably good practice if someone who knows the

individual and can relate well to the individual and who knows the individual and feels comfortable with (3848).

CHART 62I - LJ

The patient was rehospitalized (3850); there appears to be medical intervention prior to rehospitalization (3851), long psychiatric history (3851); potentially dangerous, he decompensated before his hospitalization; chart complete and adequate (3853); he was receiving perfectly fine care at the Lafayette Center (3854). I had no trouble reading this chart or any other chart.

CHART 6 2J - ML

Patient himself stopped his medication (3858); in September he became increasingly disorganized -- paranoid and threatening, he assaulted a female staff member and subsequently was hospitalized at Beth Israel (3859); discharge against medical advice; he chose to be discharged (3859). I am looking at the TLC chart (3860). Dr. Easton prescribed medicine for patient, the chart appears to be what is required and necessary for completeness under the statute (3861); progress notes are written correctly and at the specified time that progress notes are required (3862); he was discharged 11/9/84 (3963) at 27, he has 5 or 6 hospitalizations; he took himself off medication (3864) in 7/84, the chart is adequate and complete according to regulations, Section 586 of the Mental Hygiene Law; the quality of care was adequate and proper (3865).

CHART 62K - DL - 8H Chart

There is an initial by a staff person as well as progress notes. This is a community residence, not a psychiatric (3867) treatment facility. On the Lafayette Center chart there is a psychiatric assessment in the intake form, a good number of treatment plans; he (the patient) denied psychiatric problems (3868); HV are used on a regular basis to provide evaluation and ongoing assessment. The BH chart and progress notes appear to

be adequate in terms of the needs of community residence (3870). The TLC chart has requirements as outlined by statute for progress notes, treatment plans and other necessary evaluations; I think the care provided by facilities is adequate and satisfactory (3871).

CHART 62L - PM - TLC Chart

The intake form is a psychiatric assessment, there are two charts (3871); in both charts it looks like (3871) in both charts, TLC and BH, diagnosis dementia praecox (3872). 9/15/82 treatment plan (3s7s); she attends TLC on regular consistent basis -- I think HV would be necessary with her (3876); **charts are complete** and adequate and certainly meet the requirements of the statute (3878); white-outs doesn't seem to be significant, what is being discarded here are goals -- BH chart white-out 10/14/81 (3879); I don' t see any white-outs in BH chart (3880); BH 1984 white-out don' t see white-out in 1984.

CHART 62M - JO

This individual was receiving care from an outside psychiatric facility (3883). TLC chart shows communication with outside agency; it appears again to meet the regulations as outlined in Section 585 as to care received (3884); quality of care from chart of TLC and BH was adequate and well documented (3885). HV were provided this patient according to TLC chart (3886).

CHART 62N - BP (3886) - TLC Chart

This chart shows seven (7) prior hospitalizations prior to being admitted to BH on B/20/84 and discharged 1/6/86; there were four (4) hospitalizations during that period (3887); the patient is inconsistent with her medication -- consultations between the staff of BH and Beth Israel (3888); I believe the chart is complete and adequate (3889), it complies with the regulations for

charts in BH and TLC (3889). The care appears to be adequate and proper and in the best interests of helping this individual; I do not feel the work with this patient to be negligent (3891).

CHART 62P - BS (3892) - TLC

This chart is complete, it meets the standards of the law, the patient was noncompliant, incooperative with the program (3893); she was constantly reviewed and evaluated by psychiatrists of TLC program. The chart is complete and adequate, it complied with the regulations; the care appeared to be adequate and proper (3897).

CHART 62Q - BS - TLC Chart

This chart showed patient suffered periodically to hallucinate (3897); HV are one form of therapy to reduce hallucinations (3899); there are indications of consultations. He is a chronically depressed individual; was complete and adequate; it meets the regulations (3900); the quality of care was quite adequate (3901). I felt I could find from the charts how the patient was doing (3906) in hospitalization, each case has to be looked at, we don't have any certain way of determining this (3910); I didn't find the staff to be negligent. I thought they were doing a competent and excellent and caring job (3911).

CHARLES TUCEK was called as a witness by defendants. His testimony, in substance, was -- he is a graduate of Massachusetts Institute of Technology and Miami School of Medicine. I did my psychiatric residency at the New York State Psychiatric Institute of Columbia Presbyterian Medical Complex (4010). He became Board Certified in October 1977; he worked at the South Beach Psychiatric Center as staff psychiatrist in the intensive unit (4114).

Dr. Tucek was asked by Linda Preslen, one of the deputy directors of South Beach Psychiatric Center to

participate in a survey of Boerum Hill Residence of BPRI in July or August of 1984 (4017). I was told that a survey was to be done at the request of Sarah Connell, who was the regional director at the time of the New York (4018) City region of the Office of Mental Health. It was my understanding that the survey had been occasioned by the fact that a number of suicides had occurred in the facility in the past year or so. It was not clear to me what the specific objectives of the survey were to be (4019). There were eight members of the survey team (4021), each one being a professional in his field of psychiatry. We completed the chart reviews in a day (4031). On September 25 we reviewed we reviewed the charts of the 93 people that we interviewed (4032). The two reports were marked into evidence (4035). Both reports have findings (4036). The background of each team member is in the record on pages 4037, 4038 and 4039. My impression was that the patients that were placed in BH residence were in fact appropriately placed there. We found that to be significant because we interviewed 93 and to not find even one person during that whole time that seemed an inappropriate placement was remarkable in itself (4041). The impression we gathered from the patients themselves during the interview was that as a group they appeared to be satisfied with the type of care they were receiving, so this is the sort of a consumer-based input which is completely different from the usual sort of survey where the level of care tends to be assessed by the level of documentation which is done by staff on the staff's impression of what they are doing for the patients; the BH residents were satisfied with the care they were getting and did not wish to change in any significant way the nature of the care or the treatment. In my contacts with Irving Link, who was the director of the program; he appeared to be well-informed about every patient that I asked him any questions about (4042). I thought that this was a rather remarkabie finding in itself. No particular trend from interviewing the patients that would indicate that there was any major complaint, dissatisfaction or deficiency in the care according to the patients. The attitude of the surveyors, by and large,

appeared to be that the type of care is determined by the level of documentation in the charts and not by the way the actual consumer feels (4043). One of the questions we had was a (4043) significant number of people appeared not to need any medication at all. One of the things that stood out was that approximately one-third of the (4044) sample indicated that they did not have a treating psychiatrist, it wasn't clear to us whether this was due to the fact that they were not taking medication for years. Overall impression after completing part one of report, that there is a lot of activity and some kind of care for the patients in this residence since most of them spent their time in the residence or Lafayette Center (4045). Page 14 of MM-2 item number L, we considered a crucial deficit and that is to say that there was evidence of communication between providers in 65 of the 93 charts. In 28 it was either absent or unclear, approximately one-third was absent or unclear in the charts. We thought that this was an area that needed to be addressed and corrected (4151). We never saw the Lafayette Center charts so I cannot comment about those records. On MM-2 some portion (4052) of the charts clearly linked diagnosis and treatment and that if no treatable condition exists that fact should be evident (4053). Since that finding was paralled in part two of the report, we decided to incorporate it as a specific recommendation (4053); the fact that the facility served chronically mentally ill patients that any non-hospital facility that I know of and that it had been doing so for over 20 years and that it seemed to be performing what was clearly an irreplacable service. I am talking about the housing of the mentally ill. That is an area in which I have some competence. One of the single most difficult problems in making treatment plans and disposition plans for the mentally ill is finding these people a place to live (4056). Appendix two, page three indicates who the providers of mental health services are; we ascertained how many of these individuals received mental health care at Boerum Hill and/or the Lafayette Center (4060), we identified a total of 120 service providers (4060) providing service to 93 people that we interviewed meaning that some were

individually receiving service in more than one place (4061). Our overall impression, the level of care being (4063) -- my impression was that the level provided these people was quite large.

The Judicial Hearing Officer is in accord with Dr. Tucek's finding that communication by BH with outside providers was deficient and should have been corrected. In sum the Judicial Hearing Officer has given considerable weight to Dr. Tucek's report and testimony that there was no complaint, dissatisfaction or deficiency on the quality of care that was rendered by BH to its residents. The Judicial Hearing Officer finds the quality of care is in compliance with the Regulations and Guidelines.

RALPH NOFI was called as a witness by the defendants. His testimony, in part, was "I am a graduate student" at " Hahnemann University in Philadelphia," working "For a PSY.d. in Clinical Psychology which is "A doctoral degree" (1998). His academic background is set forth on pages 1998 and 1999 of the record. He was associated with BPRI in January 1980 as a Counselor at Lafayette Center (TLC), the day treatment (1999) program until November 1980. I made contact with my clients at Lafayette Center and if they lived at the (BH) residence (2003) or at their home. After November 1980 I became director of the independent living program (2004). In 1981 Dr. Easton became the medical director of TLC until October 20, 1986. Irving Link became the executive director (2005). I would see Dr. Easton every week at team meetings (2006). At the Tuesday clinical meetings Dr. Easton would talk about the psychosocial approach on how it depended on consistent and intensive contact with the patient (2008) and said that people should be seen as often as possible every day or several times a day as needed (2009). Home visits (HV) were on a HV log (2011). I was assistant director from the summer of 1983 to August 1984; in July and August 1985 I was acting director, replacing Connie Newman of the day program (5039). In September 1985 I was working on the computer (5040).

I am familiar with how BPRI billed . Medicaid because I billed for Medicaid when I worked there, beginning 1980 whenever anybody had a group or an activity that they attended, the counselor who was running the group or activity wrote up who was in the group, the clinical notes on attendance and performance sheets (5040); I wrote down the names of people who were on the attendance and performance sheet when the group was held, the name of the group, my name as the group leader, and made some notes or their functioning and their performance in the group. Everybody who ran groups did that at Lafayette Center (5041). I saw everybody who ran groups do the same thing. It was policy at the Lafayette Center. I also had a number of clients for whom I was personally responsible for and I was their manager and coordinated their treatment (5041). I do the billing for my clients; I would go through the binders for that week and noted down what groups my clients had gone to on each day, I would total up the time that-they spent in the groups and activities; if they were there for at least three hours it would be a half-day, if they were there for five hours it was a full day (5042). After I finished the case managers work sheets, I would get the pink forms that were submitted to Medicaid and I would fill it out for each client for that week, listing the name and date and what the service was and what the charges were. Each case manager was responsible for doing their work sheet, they filled out the invoices that would go to Medicaid. Sometime during 1986 they hired a clerk. I would do the case managers worksheets, give them to the clerk who would fill out the pink forms that went to Medicaid. The material that went to Medicaid identified the person at BPRI who was responsible for making (5044) sure the services were done. Around February 1981 (5045) the staff was instructed at staff meetings (5046) that to bill for, home visits we had to have more documentation for the services. We instituted some additional forms to be filled out, which were distributed to staff. There were logsheets, individual counseling forms and more communication with the staff at the residence (that is me and the people on my team) (5046) on the sixth floor had a separate

message book where we kept notes on what we had done with our clients and whether this person met the criteria for full, half day or home visits. After that I filled out my case managers sheet. I gave it to the clerk who then transcribed it on the invoice for Medicaid. The person who signed the bottom of the case managers worksheet was responsible for the billing (5049). The billing was only done off a case manager's worksheet (5058). When I signed the bottom of a case managers worksheet I was certifying that those services were given to the client (5074) Every person who was a primary case manager had an I.D. (a code) number, not every staff person (5091). A person could be seen at home by a number of different people; I as the case manager would after talking to the people, looking at documentation would determine minutes, does it meet the criteria for a billable home visit and I would put it down, and that I be true even if I had no contact with the person that day (5091). The HV logsheet did not indicate the specific amount of time that was spent with the client (patient) (5094). The attendance and performance sheets were used at TLC and BH (5101).

The period of July 1985 (5389) referring to exhibit BBB2, the case managers worksheet for Marcus Dolerty for 7/22/85 (5390) and the Marcus Doherty computation on 7/25/85, prepared by Mr. Rybaltowski; Mr. Nofi's testimony that Mr. Doherty was responsible for two clients on 7/22/85, billing for one (5391). After I submitted a copy of exhibit BBB4, page 4 to Acumedic (5399) the agency (TLC) would get back a printout from Acumedic of all information that was on this form (BBB4, page 4), exhibit BBB5 is a copy of what the agency received when we submitted billing to Acumedic for Mr. Doherty on 7/25/85 (5400) for McNeill (5401); it indicates the ID number. I had no discussions with Dr. Easton concerning billing process when I worked at 8PRI (5406).

The Judicial Hearing Officer finds-that had Messrs. Rybaltowski and Rester talked with Mr. Nofi, based on his knowledge of the residents of Boerum Hill

and clients of Lafayette Center, they could have saved themselves much of their time in the investigation and would have the exact billings to Medicaid and the names of the employees that rendered the home visit services.

ETHIEL WOOLLEY was called as a witness by the defendants. Her testimony, in part, is set forth herein. She was employed by BPRI from 1981 to 1986. Her duty was to bill for Medicare and Medicare charges. My supervisor was Connie Newman (5314). She was shown case managers worksheets, being exhibit BBB2 in evidence (5316); the third page is case managers worksheet for week of 7/22/85, signed at the bottom, the Marcus Doherty one (5317) I prepared a tally sheet from the case managers worksheet (5320) which was marked into evidence as BBBl; I would transfer the names Verlene McNeill (5321) and Satsutko Gelman to the tally sheet, transferring the charges for each day, except that on the tally sheet there would be numbers rather than names (5322); for Verlene McNeill is 36V, which means a home visit (5321). There is no bills for Satsutko Gelman for 7/22/85 (5326). When I filled out a Medicaid billing tally sheet there was an I.D. number generally put next to patient name; each client was assigned a number (5327). Mr. Doherty was responsible for only two client on 7/25/85; there was only one billing; there was no billing for Gelman (5328). For McNeill 36V there was a billing for 7/22, 7/23, 7/24, 7/25, 7/26 and 7/28, none for 7/27 (5329). Mr. Doherty entered on his case manager worksheet shows a HV for the same dates (5330). I would bill only one service for a particular day (5331). No billing was made for Miss Gelman. In 7/25/85 Marcus Doherty was responsible for two clients as far as billing to Medicaid (5333). Exhibit BBB5 marked for identification is the printout of the billing that I submitted (5353); it shows the McNeill name and the date 7/25/85 and the employees I.D. number, 0004 (5354) Marcus Doherty, Dr. Easton did not submit a bill for services rendered by him (5368); he never discussed billing with me during the period I was at BPRI (5359).

The Judicial Hearing Officer finds after a review of the testimony that the Office of Mental Health investigators, Messrs. Rybaltowski and Kester, that they could have saved much of their time had either or both consulted with Ms. Woolley regarding the actual billings to Medicaid by the defendants.

MARK KOLLENSCHER was called as a witness by the defendant. His testimony, in part, is hereinafter set forth. He is the President of Acumedic Computer Systems that provides data processing services for clinical and Medicaid health providers in New York Tri-State areas. Exhihit BBB4, page 4, is the Medicaid claim forms we provided (5380) to them in order for them to transmit the necessary information for billing; we had to generate magnetic tape that has the New York State specifications. We use to process exhibit BBB4 every two weeks for Lafayette Center (5381); identifying who the patient is, the date he came, the employee I.D. who provided the actual services, we used the code to identify what service that the (New York) State allowed them to render, namely, full or half-day services, which would verify by various means that we have; whether the information is proper for transmission (5382). We provided the provider I.D. number, There was also a place for Dr. Easton's medical license number; the money that generated by transmitting those claims and goes on the provider I.D. is being used in this case (5383) the (TLC) facility. Every time we submit a tape to the State (5384) we submitted a summary of all the information that went on the tape which had the employee I.D. number who rendered the service (5386). At BPRI Connie Newman was contacted (5388).

The investigators, John Rybaltowski and Michael M. Kester, from the Office of Mental Health, could have obtained their information which would have been more accurate than the method used by them to arrive at the number of home visits allegedly made and billed for the case managers.

MICHAEL G. KESTER was called as a witness for the plaintiff. His testimony, in part, is now being referred to. He is an employee of the Commission on Quality of Care for the Mentally Disabled as an assistant program cost analyst. His education background and experience is set forth on pages 2095 to 2097 of the record. He is familiar with BPRI; he took part in the investigation of the operation of the organization and its Medicaid billings (2097) relating to HV being performed by Lafayette Center. I prepared the cover sheets for what is marked exhibits 56A through 56E. Behind each cover sheet are contained home visit log sheets, case managers worksheets, and time sheets for the employees whose name is typed on the front sheet (2099) which I obtained from TLC (2100). I chose five case managers, five dates. To give us an example in each week, I was told to pick a day of each week (2111); for Maxine Lynch 31 home visits (2131) for May 1 for the second floor and every time I saw Maxine Lynch's signature next to a clients name I put the clients name on the front of the sheet (2113); then I went to the case managers work sheet for May 1, 1986 to determine if the clients names appeared on the case managers worksheet, and to see what was indicated on the case managers worksheet as a service that was to be billed for (2114). At this point the Judicial Hearing Officer notes that page 2115 is missing. On page 2116 it refers to Jimmy Dean Frasier and Mark Balsam's case worksheets which indicates 29 home visits on 14 full-day visits were checked; it includes a full-day visit, two half-day visits on three half-day visits; 15 home visits were billed for (2116); eleven full visits were billed for (2117); Maxine Lynch worked seven hours.

Exhibit 56B is titled Bernetta Grayson, May 7, 1986, home visit log (2117) shows 28. The case managers worksheets of Peter Yee, Margo Rabiner, Robert Cassan and Bernetta Grayson were responsible for recording the home visits and services for the clients seen by Bernetta Grayson on May 7, 1986 (2118). The question was rephrased and Mr. Kester answered 27 home visits. Only one of the three names that were on

Bernetta Grayson's work sheet is reflected on this top page. Twelve full-day visits were listed on the case managers worksheet (2119) which includes two half-day visits. Mr. Kester then stated that eleven HV were billed to clients listed on exhibit 56B; twelve full-day visits were billed and five were not billed. The same methodology was followed as to Exhibit 56C as to Fred Lawrence (2120), who he checked had twenty-eight (28) HV: he checked twenty-five (25); none of Mr. Lawrence's worksheets were signed by him (2121); eighteen (l8) full-day visits which include two (2) half-days; sixteen (16) were billed to Medicaid according to Mr. Kester; four (4) were not billed; and he worked six (6) hours (2121).

Re - 56D -- Diane McGrath (2121), May 23, 1986; signed next to 30 names on 1O9 sheets; recorded 29 HV on worksheet; she signed one full-day visit; billed to Medicaid were 21 HV; full days billed 2; 7 not billed; worked seven hours.

Meg Grill, home visits on her log sheets 29; HV 28 case managers worksheet; full-day 10, she did not complete any of worksheets (2124); full-days visit 10; billed to Medicaid for home visits 15; full-day visits billed to Medicaid 6; full-day visits not billed 7; hours worked eight (2124).

Exhibit 56F, Maria Rivera, May 14, 1986 (2125), HV on log sheets 28; case managers worksheets 27, HV recorded on case managers worksheet 15; full-day visits recorded on case managers worksheet 10 (2125); HV billed to Medicaid 16; full-day visits billed 8; not billed 4.

Cross-examination by Mr. Cohen, attorney for defendants, Mr. Kester testified that billing was performed at BPRI - Ethel Woolley; the billing coordinator would review the case managers worksheets and bill (2127) the Department of Social Services based on her findings on the case managers worksheet. Mrs. Woolley did not take anything from the

HV log sheet (2129). I did not talk to Ms. Lynch (2130) about her billings for May 1, 1986, nor did I talk to Mark Balsam about his billings for the same day, nor to Ms. Frasier, nor to any of the people who filled out HV logs in plaintiff 56A (2131). I did not talk to the people who filled out case manager work sheets for plaintiff's exhibit 56A thru F (2132). Mr. Kester could not tell us whether any of the HV were less than 30 minutes (2133). On the HV log next to the name of Ms. Herman appears the name of Meg Grill, whereas on the case managers the name of Helise Kugler (2139) when I did my analysis I was attempting to determine if on any given day the person could have performed, based on the hours she worked, enough home visits as per her signature on the home visit 1O9 sheets (2142). I prepared plaintiff's exhibit 52 (2143).

The Judicial Hearing Officer fails to understand why Mr. Kester did not talk to Miss Newman, the billing coordinator, and the person that had the record of each employee and client - 65 for whom home visits were billed; Mr. Kester would have received the accurate Medicaid billings.

JOHN RYBALTOWSKI was called as a witness by the plaintiff; in January 1986 he became a program cost analyst for the Commission on Quality Care for the Mentally Disabled (1634). Mr. Michael Kester works for me on the auditing staff. I am familiar with BPRI, in January 1986 I was part of a team that investigated that agency (1635); my specific role was looking at the Medicaid claims made by BPRI. The witness was shown plaintiff's exhibit 45. Mr. Rybaltowski stated, "These are home-visit log sheets for days within October of 1985 for the fifth floor." "They were located at the Lafayette Center" (1637). The home visit 1O9 sheet records the visit (1638). The first column reflects the room where client was residing and his name. The second column called code number list and has five codes at the top of the sheets; number one would be verbal therapy, two is assessment and treatment planning. As the floor manager conducts the home (1640) visit they would

record the code and they would describe how the patient was when they did the home visit.

During my investigation I learned what the total Medicaid billing for home visits were for the year 1984, 1985 and 1986 (1663). My source of knowledge came from "Yes. It was a printout generated by the Medicaid Management Information Systems, which is the payment system for Medicaid . . . I obtained it directly from the immediate case manager information system." (1664) Mr. Ryaltowski looked at specific home visit 1O9 sheets and case managers records (1676) for the month of October 1985, and employee time sheets during that period. We chose October 1985, it was one of the higher months where home visits were billed by BPRI and representative of the entire year of 1985 (1677). There were 3536 home visits billed. In 1985 there were 39,385 billed (1678). We derived the figure from one of the MMIS (Medicaid Management Information System) printout I obtained (1679). The only home visits I counted were for October 1985 (1687); the total services were 3,536; the total amount paid was $139.871 (1690).

For October 14, 1985 we looked at Mr. Anand Bargoti's time sheet which reflected that he spent 13 hours that day. We looked at his home visit log sheets for October 14, 1985, and we counted up every time he signed his name on the home visit log sheet and we counted up the number of people that he allegedly provided a home visit to that day, there were 65. We then went to the case manager work sheets for all the clients to determine whether a home visit recorded on the case manager work sheet (1692). We went through the blue printout which showed the Medicaid billings to determine of those 65 clients how many were actually billed to the Medicaid program for home visits. Mr.Rybaltowski found for that day 50 people were billed for a home visit, 14 were billed a full-day, 2 were billed for a half-day and 10 clients were not billed at all (1693). Mr. Bargoti didn't bill for home visits; we have never seen a billing sheet for him (1693). Mr. Bargoti is

not a case manager he is a floor manager at BH; Mr. Bargoti doesn't bill (1719) number of home visits billed, for example, Diane McGrath -- we (1702) had 16 home visits billed for her on October 3; she only worked seven hours that day; each home visit must be 30 minutes. She could only have performed 14, 7 times 2, in the hours worked. She in fact had 16 of those billed that day (1703); she allegedly provided 30 home visits that day; 30 of those 36, 10 of them were billed to the Medicaid program. I am relating the 16 to the seven hours (1704).

Mr. Rybaltowski's conclusion was that for the month of October 1985 virtually every case manager provided more home visits than what the house they worked at any point during that month (1707). Floor managers were providing more home visits in any given day than they worked that day (1708). Based on the description or the home visit log sheet it was our opinion that there was apparently no face-to-face contact that day (1714) . If you look at page three the compilation, you will see Mr. Kayeblum name and it reflects "at home with his parents," and if we looked at plaintiff's exhibit 47 we will notice that Mr. Kayeblum was billed for a home visit that day (1715). We found that they were in fact billed for a home visit that day (1716). Mr. Bargoti doesn't bill (1719). I learned that Bargoti allegedly provided a home visit to Mr. Kayeblum on 10/3/85, and that the home visit was billed to the Medicaid program when I looked at exhibit 47 (1720). On 10/3/85 the description for Mr. Tarik was that he was showering and that he was not in his room. A home visit was billed for Mr. Tarik for 10/2/85 (1729). In regard to client Eleanor Naser, the description is "not in room". Mr. Rybaltowski determined that a home visit was billed for Eleanor Naser which was a review of plaintiff's 47 . In reviewing Lafayette Center home log of 10/10/85 in regards to client Joseph Monntalbano, the description reads "not in room, door open". In reviewing the billing Mr. Rybaltowski found that Mr. Montalbano was billed for a home visit that day (1731). On 10/10/85 Mr. Rybaltowski made a finding in regard to client Eleanor

Naser, the description reads "not in room" which appears twice; she was billed for a home visit (1732). At this point Mr. Cohen, attorney for defendants, suggested that if Mr. Rybaltowski testimony is that he found billings for each of the people in plaintiff's 51 for identification which total 27, and there various comments in the home visit log; without going into them, if you mark the logs for me I will stipulate that's his testimony (1732). Mr. Cohen is willing to accept the compilation with the logs attached to it. Without specifying the truth Mr. Cohen is willing to accept the fact that he (Rybaltowski) found that the names contained therein, that he found a billing for those particular dates in it and the home visit logs will reflect a variety of comments (1733).

Plaintiff's exhibit 52 was prepared April 24, 1987, "It reflects two employees of BPRI, Paul Callender and Rhonda Captan. " (1736) "We went through Plaintiff 's exhibit 47 and for each day of the month of October 1985 we recorded what Medicaid service was billed by BPRI for these two employees. " (1739) "I only know what is recorded on his" (Callender) "time sheet. That's a system's administrator, I believe." "I believe what he did was he was an assistant in the computer -- BPRI and Lafayette Center was trying to develop a computer system for their billings and for other reasons. I think he was an assistant there." (1741)

I never spoke to Mr. Callender (1742). "Yes, we found that certain clients at BPRI were billed for services by BPRI as well as services provided by another outpatient program on the same day. (1744) "I learned that BPRI began a new -- I am not so sure it's new -- but they developed a new home visit log sheet which would reflect the number of home visits provided to clients and that during that time the staff was instructed to provide -- . . . The staff was instructed to provide a daily home visit for all clients at the Boerum Hill Residence. (1774)

Under cross-examination Mr. Rybaltowski, in part, "There were 3556 home visits billed and I'd have to go back to look to see how many people that relates to." (1776) In my investigation I learned that billings were not done directly from home visit log sheets (1800), they were done from the case managers worksheet (1801). "I can't recall if we did or not" look at the case manager's worksheets. "I think we probably would have but I don't recall. I know that we got the names from the printout of the Medicaid billings because -- we know who was being billed for home visits on these given days." (1801) "I don't know. I'd have to look at the case manager work sheet. Mr. Kayeblum -- it wouldn't be because this is Mr. Bargoti, and as I recall he doesn't complete case manager work sheets." (1802) "Ethel Wooley, the billing coordinator" billed for Arthur Kayeblum on October 3, 1985. "He obtains it from the case manager's work sheets . The people who sign the case manager work sheets are counselor at the Lafayette Center." (1805) The person that signed the case managers worksheets was "Mr. Eric Rosenberg". I have no idea if he (Mr. Rosenberg) saw him (Mr. Kayeblum) on October 3, 1985 (1808).

Mr. Rybaltowski indicated Ms. McGrath's time shows she worked seven (7) hours, and her case manager's work sheet she had 30 home visits; and 16 were billed. Ms. McGrath did not bill them "she doesn't bill" (1817) and "she doesn't sign case manager's worksheets (1819).

He (Mr. Balsam) recorded the letters HV fourteen times. "Four times" full day visit (1928). "As I recall if two H's were on the block, she would consider that to be a full day and she would bill a full visit." (1929) One block under October 1, 1985 has two H's, she would consider it a full-day (1929). "According to Miss Wooley what she told me that's correct, she would bill for a full day visit before" a home visit." (1930) Miss Wooley would bill "If it worked ideally, she would have billed six full day visits, yes." (1930) Mr. Balsam on October 1, 1985 worked "Eight hours" (1932). I believe

he (Mark Balsam) was "a supervisor or case manager, but I can't say for sure." (1934) On October 29, 1985 Mr. Balsam recorded home visits "okay, sixteen times". H's "Five times". Miss Wooley billed eleven times for home visit for BPRI for the people on Mr. Balsam's case manager worksheet. "If it worked that way, yes, Ideally . . . What I ' ve indicated before was that he saw twenty-seven people for the home visit 1O9 sheet. If you take those twenty-seven people, trace them back into the case manager work sheets, twenty six people were on the work sheet as if a home visit were provided." (1939) "The staff told us that a significant contact had to be made. (1943) Referring to plaintiff's exhibit 51 dated April 30, 1987, home visits with no apparent face to face contact with Mr. DeJanni where you have next to it "showering, not in room" as a description on the log (1944), and determined "Ethel Wooley, the billing coordinator" billed for her. The case manager worksheet was "Signed by Mark Balsam" for the week of September 30, which would include the first six days of October. He (Mr. Balsam) has a home visit and he has an H recorded" in the box next to Mr. DeJani's name for October 3, 1985. "He has a home visit and he has an H recorded." (1945) "H signifies a half-day visit." Take a look at October 10, 1985, Joseph Montalbano, where you indicated home visit log has a notation "not in room". Ethel Wooley, the billing coordinator billed for BPRI (1946) "This is a case manager work sheet for the week ending October 13th, 1985," signed by Ms. Jimmie Dean Frazier. The date of the services were rendered on October 10, 1985 by Ms. Frazier to Mr. Joseph Montalbano. "No. Miss Frazier recorded an H.V. had an H for (1947) Mr. Montalbano on that date." (1948) "Case manager work sheet for the week beginning October 14th, 1985 . . . The sheet reflects that Mr. Balsam recorded an H.V. and an H for Miss Birdsong on October 14th." (1950) I did not talk to Mr. Balsam about whether he saw Ms. Birdsong that day (1950). "Well, I instructed Mr. Kester to do this sheet, and I don't recall if he actually looked at the case manager work sheet or not." (1951)

Plaintiff's 54 is a compilation which Mike Kester did, it is a summary of all services billed and paid by the Medicaid system for BPRI during 1984 and 1985. We went through various services that provided services such as HV or full-day visits allow and determined the number of services provided and much was paid during that month or during the year (1763). For 1984 there was 21,190 services provided, probably 1800 a month; in 1985 there were 39,335 HV, average 3100 or 3200 a month; in 1986, January through October 20 (1769) there were 25,930, an average of 2500 or 2600 a month (1770); October 1985 was indicative of the entire year of 1985 (1770).

Under cross-examination by Mr. Cohen, attorney for defendants, the testimony showed the number of residents in Boerum Hill was 196. I don't know the exact number of people that received HV in the Satellite apartments (1775). I and Paul Stavis (the lawyer for the Commission on Quality of Care) talked to 13 staff people of BPRI (1788). Billings were not done from the HV log (1800). I can't recall if we looked at case managers; I know that we got the names from the printout of the Medicaid worksheets (1801) billings. The individual who billed for Kayeblum on October 3, 1985 was Ethel Wooley, the billing coordinator (1803). The case manager's worksheet is submitted to Ethel Wooley, the billing coordinator for billing of HV. The people who sign the case manager's worksheet are counselors at Lafayette Center (1805). Mr. Eric Rosenberg signed for Mr. Kayeblum (1806). I have no idea if Mr. Rosenberg saw Mr. Kayeblum on October 3, 1985; I didn't ask him (1807). The individual names of the 13 staff people interviewed by me and Mr. Stavis are listed on page 1864. Miss Newman provided a copy of BPRI's policy which was offered into evidence. Voir Dire Mr. Glickman (1867). The document does not reflect BPRI policy (1868). B is marked defendant's Y for identification. I wrote the first page (1872). I or Mike Kester compiled the document at BPRI, I saw second page, the title says Daily HV (1873). John DeSantis is a principal auditor with the Department of Social Service

(1883). An audit was performed by the Office of Social Service from July 1979 to March 1980 (1884). I reviewed the guidelines and spoke to Mr. Chase about HV matter. The guidelines I obtained from Mr. Chase is dated October 14, 1985 (1887). I don't know if Ms. McGrath provided thirty HV, I know what she recorded on the HV log sheet -- she signed (1889) her name next to thirty people on the case managers worksheet (1890). The court stated that Verlene McNeil's signature on line is illegible (1894). I believe the signature is Ed Ferguson (1895). Underneath on B, I believe the signature is Diana McGrath (1896). Diana McGrath signed the ease manager worksheet for Verlene McNeil, that was used by Miss Wooley for billing (1898). Miss McGrath completed on her worksheet two people (1905). Ms. McGrath saw that two clients she is responsible for received HV on October 3rd as she put down the letter HV in both of those blocks (1907). I came to that conclusion based on my investigation (1908). On October 1, 1985 Mr. Mark Balsam saw 23 people per the HV log sheet (1923). We recorded the letter HV on his case managers worksheet fourteen (14) times, for full day four times (1928). Two H's, one; the eight person had 3 H's, 2 H's (1929). Plaintiff's 46, Mr. Balsam's worksheet, period 9/30 thru 10/6/85, he worked eight hours (1932). I believe, he was a supervisor or a case manager, but I can't say for sure (1934). I don't recall if Carol Jennette filled out a case manager, (1937) worksheet on 10/14/85. Mr. Balsam on 10/29/85 (1938) he recorded a HV sixteen times; H's five times; eleven times a HV would be billed by Miss Wooley for BPRI for the people on Mr. Balsam's case manager worksheet. What I indicated before was he recorded 16 times a home visit; five times a full visit (1939). Mark Balsam signed the case manager worksheet for Mr. DeJanni (Plf's Exh. 51) for week September 30 which include the first six days of October on October 3rd, he has HV and an H which signifies a half-day (1945). On October 10, 1985 John Montalbano has a notation on HV log "not in room"; Ethel Wooley filled (1946), case manager worksheet signed by Ms. Jimmie Dean Frazer, she recorded an HV and an H for (1947) for Mr.

Montalbano. No I do not know if Ms. Frazer saw him that day (1948). Look at 10/14/85 as to Barbara Birdsong, the HV log is blank, we put down no comment (1949); the case manager worksheet beginning 10/14/85 signed by Mr. Balsam recorded a HV and an H for Miss Birdsong. I did not speak to Mr. Balsam whether he saw Miss Birdsong that day. Do you know who filled out the case managers worksheet for Mr. Kawe Bloom first name on plaintiff's exhibit 51 (1950); I instructed Mike Kester to do this sheet; I don't recall if he looked at case managers worksheet or not. For Robert Goodfriend (1952) we never did a review for collateral visits (1958).

Plaintiff's exhibit 55 for identification -- it's C28, 29, 30 -- analysis of HV during October 1985 by date; it lists case managers who recorded their names on HV logs during that month, and it also records the time they work on any given date during the month (1971), it also includes floor managers on BH. Mike Kester prepared it under my supervision (1972). Mike Kester and I went thru every HV log sheet for October 1985 and for each case manager in Boerum Hill; we counted up the number of people, their name appears on the HV log sheet for each day during the month. We did not refer to the case managers worksheet to determine whether those visits we presented for billings (1973).

The Judicial Hearing Officer here notes two examples of Mr. Rybaltowski's investigation that caused the Judicial Hearing Officer to consider the weight to be given to his testimony.

The first relates to Mr. Anand Bargoti, employed as a floor manager in Boerum Hill Residence. Mr. Rybaltoswki reported that on October 14, 1985 Mr. Bargoti worked thirteen (13) hours; that his home visit log sheet indicates he provided sixty-five (65) home visits and that fifty were billed to Medicaid. Mr. Bargoti is not a case manager and he doesn't bill, nor had we even seen a billing (1917) of his, and that billings were not done from log sheets they were done from case managers worksheets (1801).

The second is Ms. McGrath. Mr. Rybaltowski stated her time sheet shows she worked seven (7) hours and her case manager's worksheet shows she provided thirty (30) home visits and sixteen (16) were billed. He testified, "she doesn't bill," and she doesn't sign case manager's worksheets (1817); from which the billings are made. Had Mr. Rybaltowski talked to Ms. Connie Newman, the billing coordinator and the person in possession of the records of each employee and patient for whom home visits were provided and billed, Mr. Rybaltowski would have received the correct name of the employee charged with the Medicaid billing.

The Judicial Hearing Officer finds Mr. Rybaltowski's methodology in investigating the number of home visits charged to the employees of the two involved facilities, BH and TLC, and the billing to Medicaid as indicated in his testimony was not actual or accurate; had he talked with Mr. Ralph Nofi who was familiar with the billing methods of the facilities; or Mr. Kollenscher, the President of Acumedic Computer Systems; he (Rybaltowski) would have received the actual and accurate information of the number of billings made to Medicaid, the names of the employees that provided the home visit service, and the client names that received the same. The witness chose his method which resulted in his numbers being incorrect.

Petitioner's Exhibit 13 is the Mental Hygiene Law (MHL); and Petitioner's Exhibit 14 is Part 579 of the Office of Mental Health (OMH) Billing Guidelines, both are in evidence. The Judicial Hearing Officer refers to those sections that are applicable -

Section 579.6 (MHL) reads:

"(c)(5) A home visit shall be at least 30 minutes"

PART 579 (OMH) BILLING GUIDELINES

> "Section 2. - 2.3 Visits. A visit consists of all face-to-face interactions between staff and a patient ora collateral during which one or more services are provided by the program over a twenty-four hour period."

The (MIIL) Sections and (OMH) Guidelines are clear. The Judicial Hearing Officer has not found a Section or a Guideline, nor was any called to his attention, that the thirty minutes are or could be cumulated. The law is to be construed strictly as written.

The plaintiffs have failed to show one example of the contacts made by an employee of BH or TLC where a home visit was provided and billed that was not for thirty (30) minutes. The defendants did on two occasions show by the, testimony of Messrs. Yee and Nofi that there was face-to-face contact of no less than thirty (30) minutes.

After seeing and hearing the witnesses as they testified and reading, reviewing and analyzing the transcribed testimony and exhibits submitted in this proceeding, giving due consideration and weight thereto, the Judicial Hearing Officer concludes and finds:

As to #1 above, ". . . residents care," the testimony of Mr. Walter Saurack, Dr. Francine Cournos, Beatrice Braun, Dr. Mark P. Novick and Dr. Charles Tucek was given particular attention. The Judicial hearing Officer did express his thoughts at the conclusion of Dr. Tucek's testimony. The Judicial Hearing Officer finds that the quality of care given to the residents of Boerum Hill and clients of Lafayette Treatment Center program was adequate, satisfactory and sufficient.

As to #2 above, the Judicial Hearing Officer finds that the evidence or testimony adduced by plaintiffs that Dr. Easton "illegally appropriated Medicaid and Federal and State Social Security

Disability Insurance and Supplemental Security Income Funds was all circumstantial in that home visits were not properly provided and there was an overcharge for rents. No witness was called that offered or submitted competent evidence to prove that home visits did not last at least thirty minutes and were not face-to-face as required under the Statutes and Guidelines. The defendant did offer through the testimony of Mr. Peter Yee and Mr. Ralph Nofi that in at least two cases the requirements were met. It can be said and the Judicial Hearing Officer finds as a fact that of the thousands of services provided to residents of Boerum Hill and clients of the Lafayette Center, that two incidents were shown by defendants.

The Judicial Hearing Officer further funds that the face-to-face contacts of thirty (30) minutes, or more testified by Messrs. Yee and Nofi are a minute number, or a very small fraction, if compared to the number of home visits billed to Medicaid (allegedly 39,385 for the 1985 year).

The plaintiffs in paragraph "I" of their complaint claim that defendants Karl and Jacqualine Easton (his wife), and the corporations which they control have looted BPRI, a not for profit corporation. The Judicial Hearing Officer has rendered a Memorandum Decision dated December 18, 1989, fixing the monthly rental for Boerum Hill Residence at 50 Nevins Street; the 3 Lafayette Avenue Center; and for 415, 417 and 419 State Street, the Satellite Apartments, all situate in the Borough of Brooklyn, New York. The plaintiffs have taken an appeal from the Order entered thereon.

A Receiver, Federation Employment and Guidance Service (FEGS), was appointed as of October 20, 1986.

No rents have been paid by the Receiver from October 20, 1986 to the date the hearing was concluded.

The defendant Dr. Karl Easton is the president of the corporate defendants, 3 LAC that owns the land and building known as 3 Lafayette Avenue; CHCC that owns the land and building known as 50 Nevins Street; and the land and building known as 415, 417 and 419 State Street (Satellite Apartments), all situate in the Borough of Brooklyn, City and State of New York.

The Judicial Hearing Officer finds, based on the record, no competent evidence was adduced by plaintiffs to establish their claim that either Karl Easton or Jacqualine Easton, his wife, received any part, or all, of the rents that were paid for the use and occupation of the real property referred to herein.

Accordingly, the Judicial Hearing Officer finds and decides that plaintiffs have failed to meet their burden of proof of their claim listed in paragraph "1" of the complaint.

Until there is a final decision by the Appellate Courts fixing the rents for the three real properties involved, it cannot now be determined whether there was any looting of funds of the rents received by the owners.

The plaintiffs seek to recover residents funds which have fraudulently and unlawfully misused. Paragraph "19" of the complaint states:

> "19. Residents of community residences who receive SSI funds are entitled to keep $63.00 of this amount for their personal use. The facility is required by law to provide residents with these funds monthly and they may not be used for resident fees. These funds are termed 'personal allowance fundsunder Social Security Law, Section 101-o"

The Judicial Hearing Officer finds that no evidence was adduced to prove that the $63.00 payment was received and kept by anyone of the defendants.

Accordingly, the Judicial Hearing Officer finds that plaintiffs have failed to prove the allegations in paragraph "19" of the complaint.

In paragraph "25" of the complaint there is a claim of misappropriation of rents received by BPRI which legally were to be used for the benefit of the residents of BPRI. The Judicial Hearing Officer finds no testimony in the record that would establish any misappropriation of rents. The plaintiffs have failed to meet their burden of proof of any misappropriation of funds as to paragraph "25" of the complaint.

Paragraph "27" of the complaint states:

> "In July 1979, as a condition of The Operating Certificate issued by OMH, Dr. Easton was required to transfer ownership of the property housing, The Lafayette Center, from the profitmaking landlord corporation to BPRI within six months."

Paragraph "28", in part, states:

"The property was never transferred . .

The Judicial Hearing Officer finds that competent testimony was adduced and that the claims made in paragraph "27" and "28" of the complaint was proved. Plaintiffs exhibit 12D is a letter dated June 28, 1979 from the OMH, Division of Program Operations; plaintiffs exhibit 12E is the Operation Certificate with an Addendum attached. Paragraph "10" thereof reads as follows:

> "Ownership of the property shall be transferred from 3 Lafayette Avenue Corporation to Brooklyn Psychosocial Rehabilitation Institute, Inc., within six months. The terms and conditions of the transfer, the proposed contract of sale, and the revised operating budget of Brooklyn

Psychosocial Rehabilitation Institute, Inc.must be submitted for prior approval."

A letter on the letterhead of BPRI dated July 18, 1979, addressed to James A. McQuide of OMH, signed by Karl Easton, the executive officer, substantially repeats, among other things, paragraph "10" set forth above. The Judicial Hearing Officer finds that there is no testimony in this record that any action was taken by OMH to compel 3 Lafayette Avenue Corp., or BPRI, or Karl Easton to transfer, as agreed, the property.

Almost ten years time having elapsed since the agreement and promise to transfer was made. The Judicial Hearing Officer states that the attorney for the defendants has, in his Memorandum of Law, raised the question of the Statute of Limitations as a bar to any action that may be commenced in this matter.

The plaintiffs claim that Jacqualine Easton, effective December 31, 1979, transferred her proprietorship of Boerum Hill Rehabilitation Residence to BPRI (Paragraph "32" of Complaint). Paragraph "33" states that defendant Karl Easton substantially controlled BPRI Board of Directors, approved the transfer without knowledge of the value of the assets acquired and the liabilities assumed; that the Board of Directors was not informed of this fact until nine months after their approval of the transfer. Paragraph "34" states that the personal liabilities of Mrs. Easton was $54,000. The Judicial Hearing Officer finds that the first mention of a "shift in ownership of Boerum Hill from Jacqualine Easton to Brooklyn Vocational Rehabilitation Institute, Inc. (BPRI) is in a letter dated December 28, 1979, addressed to Mr. Paul Polson, President of BPRI, written on the letterhead of OMIS (Exh. I-60) over the signature of Larry Chase, Acting Director, Bureau of Inspection and Certification. The letter refers to Dr. Easton's letters of August 7, 1979 and September 12, 1979. The Board of Directors at a Special Meeting of the Executive Committee dated December 31, 1979, signed by Paul Polson (Exh. I-58),

acting as Secretary to the Executive Committee, referring to the transfer of the lease ownership of Boerum Hill Rehabilitation Residents. and repayment of loans by Mr. Easton to BPRI, Inc., which documented the action of the corporation to accept the transfer of the lease and assume payments made (Exh. I-58). Attached hereto are copies of exhibits 57, 58, 59 and 60. The Judicial Hearing Officer finds from the foregoing exhibits that OMI-I and the Board of Directors of BPRI had knowledge of the indebtedness of Jacqualine Easton.

Attached and made a part hereof is a list of Commonly used Names, Phrases and Abbreviations used in the subject proceeding.

This is the Judicial Hearing Officer's decision. No cost or disbursements granted. Judgment may be entered.

Settle Order on fifteen (15) days written notice.

/s/Carmine A. Ventiera
Carmine A. Ventiera
Judicial Hearing Officer

No. 93-57

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KARL EASTON, M.D.,

Petitioner,

—v.—

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH, and NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

The State Court Case 2

The Federal Lawsuit 5

REASONS FOR DENYING THE WRIT 7

A. This Court Lacks Jurisdiction Over The Constitutional Claims in the Petition Because They Were Not Raised in The Court Below 7

B. Even if Jurisdiction Exists, Petitioner Has Failed to Raise a Question Worthy of This Court's Review 9

CONCLUSION 12

TABLE OF AUTHORITIES

Cases	PAGE
Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	8
Brady v. State of Maryland, 373 U.S. 83 (1963)	8
Cardinale v. Louisiana, 394 U.S. 437 (1969)	8
Cloutier v. Town of Epping, 714 F.2d 1184 (1st Cir. 1983)	11
Consolidated Edison Co. v. Herrington, 752 F.Supp. 1082 (D.D.C. 1990), *aff'd* 927 F.2d 1227 (1991)	9
Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985), *cert denied*, 478 U.S. 1020 (1986)	11
Easton v. Sundram et al, 947 F.2d 1011 (2d Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1943 (1992)	2, 6, 11
Eastway Construction Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985)	7
F.D.I.C. v. CNA Casualty of Puerto Rico, 786 F.Supp. 1082, (D.Puerto Rico 1991)	10
First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	7
Hanson v. Denckla, 357 U.S. 235 (1958)	9
Illinois v. Gates, 462 U.S. 213 (1983)	8
Jones v. Chicago, 856 F.2d 985 (7th Cir. 1988)	11
Matter of Cassidy, 892 F.2d 637 (7th Cir.), *cert. denied*, 498 U.S. 812 (1990)	9
McMaster v. Cabinet for Human Resources, 824 F.2d 518, (6th Cir. 1987)	11

PAGE

Nichols v. Collins, 802 F. Supp. 66 (S.D.Tex. 1992) 11

Riggins v. Nevada, ____ U.S. ____, 112 S.Ct. 1810 (1992) 8

Scarano v. Central Railroad Company of New Jersey, 203 F.2d 510 (3d Cir. 1953) 10

S & D Maintenance Co., Inc. v. Goldin, 844 F.2d 962 (2d Cir. 1988) 7

Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 734 F.2d 730 (11th Cir. 1984) 10

United States v. Johnston, 268 U.S. 220 (1925) 12

United States v. Lehman, 756 F.2d 725 (9th Cir.) *cert. denied*, 474 U.S. 994 (1985) 10

Webb v. Webb, 451 U.S. 493 (1981) 8

Yee v. City of Escondido, California, ____ U.S. ____, 112 S.Ct. 1522 (1992) 9

Statutes

28 U.S.C. § 1257(a) 2, 7

42 U.S.C. § 1983 6

New York Social Services Law § 145-b 4, 5, 12

IN THE

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OCTOBER TERM, 1993

No. 93-57

KARL EASTON, M.D.,

Petitioner,

—v.—

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH and NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Karl Easton ("Easton" or "petitioner") seeks review of the decision and order of the Supreme Court of the State of New York, Appellate Division, Second Department dated July 6, 1992, which granted a $7.5 million judgment against him for Medicaid fraud.[1] The Appellate Division denied leave to appeal to the New York Court of Appeals on September 10, 1992, Petition ("Pet.") 5a, and the Court of Appeals denied leave to

[1] The decision below is reproduced in an appendix to this brief ("A.") because the copy that appears in Appendix D to the petition contains several major gaps in the narrative.

appeal on January 7, 1993, Pet. 3a. On April 8, 1993, the Court of Appeals denied petitioner's motion for reconsideration of the denial of leave to appeal. Pet. 1a.

Petitioner now seeks certiorari review, claiming for the first time that the judgment below violated his rights under the Fourteenth Amendment to the United States Constitution. He argues, first, that the State respondents should be "judicially estopped" from obtaining the judgment against him because of alleged inconsistencies between the State's arguments in this case and in a related federal civil rights action brought by petitioner, *Easton v. Sundram et al*, 947 F.2d 1011 (2d Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1943 (1992). Petitioner claims that this supposed inconsistency rises to the level of a federal due process violation. Second, petitioner claims that the judgment violated his due process rights because of an alleged absence of any evidence to support the unanimous finding of the court below that he designed and implemented the fraudulent Medicaid billing scheme.

The petition should be denied. As a preliminary matter, this Court lacks jurisdiction over the constitutional claims because petitioner failed to raise either of them in the court below, as required by 28 U.S.C. § 1257(a). Furthermore, even if jurisdiction were proper, petitioner's claims are based on significant mischaracterizations of the records in the court below and in the federal action. The State took factually identical positions in the two lawsuits and produced abundant evidence to support the unanimous findings of Medicaid fraud and of petitioner's personal role in the scheme. Finally, even if petitioner had raised these constitutional claims below and had accurately described the facts, he fails to raise a constitutional question worthy of this Court's attention.

STATEMENT OF THE CASE

The State Court Case

The State brought this action in 1986 alleging that petitioner utilized his role as founder, Medical Director and controlling

voice in Brooklyn Psychosocial Rehabilitation Institute ("BPRI"), a licensed mental health program, to perpetrate a massive scheme to defraud Medicaid by billing for non-existent or non-reimbursable services. The State further alleged that petitioner personally benefited from the fraud by using his role on the BPRI board of directors to arrange exorbitant, non-arm's length leases between BPRI and petitioner's family-owned realty corporations, Cobble Hill Center Corporation and 3 Lafayette Avenue Corporation, which petitioner also controlled.

The State's complaint was dismissed following trial before Judicial Hearing Officer ("JHO") Carmine A. Ventiera, Pet. 19a-70a, and the State sought an expedited appeal. In its briefs to the Appellate Division, the State reviewed the detailed evidence in the record of the illegal Medicaid billings and the fact that Easton, through his role as Medical Director of BPRI and his control over the BPRI board of directors, personally

> designed, supervised and implemented the Medicaid fraud *on behalf of BPRI* (and, ultimately, himself, through funds paid by BPRI to his family.)

Brief for Plaintiffs-Appellants to the Appellate Division, Second Department, December 16, 1991, ("Pl-App. Br.") at 65. (emphasis supplied).

The State did not argue, as petitioner claims, that Easton was liable for the Medicaid fraud *because* he and BPRI were the same entity or each others' "alter-egos", or because "the actions of one must be attributed to the other." Pet. 2, 12. Rather, the State claimed that it was Easton's dominant influence over the operations of BPRI that enabled him to play a critical role in designing the Medicaid fraud, and that it was *he*, not the BPRI board of directors or staff, that orchestrated that illegal billing scheme.

Relying on extensive documentary and testimonial evidence presented at trial, respondents proved that Easton initiated the idea of subsidizing BPRI through fraudulent "home visit" Medicaid billings, permitted use of his personal medical license

number on the fraudulent bills, supervised the design of the forms used for the fraud, instructed staff on the implementation of the scheme, prodded staff to keep up the phony billing, and advised a State official that he needed the "home visit" money to fund BPRI. *See* Plaintiffs-Appellants' Appendix filed in the Appellate Division, Second Department ("App."), 578-580, 601-620, 632-639, 658, 680-81, 701, 708-09, 734, 884, 913. Based on this evidence, the State sought a judgment against Easton under New York Social Services Law ("SSL") § 145-b, which imposes liability on any individual who falsely obtains public funds "on behalf of himself or others."[2]

The Appellate Division, Second Department unanimously reversed the dismissal of the complaint and granted judgment to the State on the record, finding that the State plaintiffs had

> carried by *overwhelming evidence* their burden of proving that the defendants fraudulently billed Medicaid for "home visits" that were not actually performed, as the patient-staff interactions reported as BPRI "home visits" did not satisfy the Medicaid regulations and guidelines.

A. 3a. (emphasis supplied). The court found that between January, 1985 and October, 1986, through this fraudulent scheme, BPRI had received $ 2,524,501 in public funds to which it was not entitled.[3] Although the payments were made to BPRI, the licensed Medicaid provider, the court ruled that it was

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[2] The relevant portion of SSL § 145-b states as follows:

> It shall be unlawful for any person, firm or corporation knowingly by means of a false statement or representation, or by deliberate concealment of any material fact, or other fraudulent scheme or device, ***on behalf of himself or others***, to attempt to obtain or to obtain payment from public funds for services or supplies furnished or purportedly furnished pursuant to this chapter. (emphasis supplied).

[3] Contrary to petitioner's statement, Pet. 18, respondents proved the amount of money fraudulently obtained through submission into evidence of computerized print-outs of payments for which, as the court below found, BPRI's records contained no documentation of reimbursable services.

clear from the trial testimony that Easton designed, supervised, and implemented BPRI's "home visit" billing fraud on Medicaid.

A. 6a.

The court further found that the Medicaid fraud "inured to the benefit of Easton and his family," who were personally enriched through BPRI's payment of "grossly inflated rents" to realty corporations "ostensibly owned" by petitioner's children, but under his "*de facto* control." A. 6a. These leases, the court ruled, were *"per se not negotiated at 'arms length' "* because petitioner sat on "both sides of the bargaining table, in his not-for-profit capacity as Medical Director of BPRI and his for-profit role as ultimate owner" of the realty corporations. A. 6a.

The Appellate Division accordingly ordered judgment against Easton pursuant to SSL § 145-b, including the treble damages mandated therein, based on his direct role in the fraud.

The Federal Lawsuit

While the Medicaid fraud case was proceeding through the State courts, Easton commenced a multi-claim federal action in the United States District Court for the Southern District of New York against ten former and current State officials, some of whom were employed by the respondents in this case.[4] Petitioner alleged, *inter alia*, that the defendants had pursued him for Medicaid fraud in retaliation for BPRI's earlier success in a State Article 78 proceeding, which challenged a State administrative decision barring patient referrals to BPRI due to its sub-standard conditions. Easton alleged that the defendants

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[4] Petitioner sued the defendants in their individual as well as official capacities and did not name any of the respondents in this case in the federal action. Yet, for purposes of his "judicial estoppel" argument, he refers to the defendants in the federal suit as "the State," based on the fact that the Attorney General's Office was counsel of record in both lawsuits. Pet. 9-10. For the sake of clarity in discussing the two cases, respondents refer to the federal defendants in this brief as "the State," without conceding the propriety of this designation.

thus had violated his First Amendment right to access to the courts.

The district court dismissed the complaint, pursuant to FRCP Rule 12(b)(6), for failure to state a claim upon which relief could be granted. The Court of Appeals for the Second Circuit affirmed. *Easton v. Sundram et al.*, 947 F.2d 1011 (2d Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1943 (1992).

In seeking dismissal of the federal complaint, the State cited the same facts about Easton and BPRI as it relied upon in this case. Petitioner's contention that the State "asserted that Dr. Easton did not control BPRI," Pet. 10, is therefore inaccurate. In fact, the State maintained in the federal action that Easton, as founder, Medical Director, and ex-officio board member of BPRI, "exercised almost total dominion and control" over that facility and utilized that control to implement the fraud. Brief for Appellees to Second Circuit Court of Appeals, May 3, 1991 ("Appellees' Br."), at 3. Indeed, since the federal lawsuit was decided on the pleadings, the State's statement of facts was based almost entirely on the State court complaint and related documents, which were annexed to the federal complaint and deemed incorporated therein.[5]

The State argued to the federal courts, however, that Easton's excessive influence over the board of directors of BPRI did not give him constitutionally-protected rights based on BPRI's conduct or property, and that, accordingly, Easton had failed to state a claim under 42 U.S.C. § 1983. Thus, the State maintained that BPRI, not Easton, had brought the Article 78 proceeding on which Easton's First Amendment claim was based, and because they were not the same entity (and the State never claimed they were), Easton could not assert BPRI's First Amendment rights. Appellees' Br. at 41-43.[6]

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[5] Since the federal complaint was dismissed on the pleadings, the State was restricted to the material that Easton himself had attached to his complaint, including 1100 pages of exhibits from the State case.

[6] The State also pointed out, in opposing Easton's claim of deprivation of property, that Easton and BPRI were separate legal entities and, as the District Court found, Easton did not have a constitutionally-pro-

The Second Circuit Court of Appeals agreed. It affirmed the dismissal of the federal complaint and held that Easton:

> has failed to demonstrate that his conduct is deserving of first amendment protection. Although we accept his argument that the institution of an Article 78 lawsuit may constitute first amendment protected activity [cites omitted], it was *BPRI*, not *Easton*, that brought the Article 78 proceeding. Therefore, accepting as true Easton's allegations that defendants sought to retaliate because OMH was unsuccessful in the Article 78 proceeding, BPRI's first amendment rights were implicated, not Easton's. *Cf. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978).

947 F.2d at 1015. Easton petitioned for certiorari, but did not raise the judicial estoppel claim, although he had argued it in his Reply Brief to the Second Circuit. The petition for a writ of certiorari was denied. 112 S.Ct. 1943.

REASONS FOR DENYING THE WRIT

A. This Court Lacks Jurisdiction Over The Constitutional Claims in the Petition Because They Were Not Raised in The Court Below

The petition for certiorari should be denied because it asks this Court to consider two constitutional claims that petitioner failed to raise in the court below. As a result, even if the questions presented were based on accurate descriptions of the records in the two courts, neither may be heard by this Court. 28 U.S.C. § 1257(a) grants this Court certiorari jurisdiction over a final state court judgment in which

> any title, right, privilege, or immunity is specially set up or claimed under the Constitution. . . .

Since the alleged due process claims asserted were not "specially set up or claimed" in the court below, petitioner failed to

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tected interest in BPRI's operating certificate. *See S & D Maintenance Co., Inc. v. Goldin*, 844 F.2d 962 (2d Cir. 1988); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985).

meet this prerequisite for review by this Court. In order to satisfy section 1257(a), petitioner must have asserted each constitutional question expressly and with specificity in the state court, *Webb v. Webb*, 451 U.S. 493 (1981), and also must have identified the particular federal constitutional provision at issue. *Id.* 451 U.S. at 496; *Brady v. State of Maryland*, 373 U.S. 83, 91 (1963). It is not sufficient if, as here, some factual allegations were made below, but not framed in constitutional terms. *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988); *see also Riggins v. Nevada*, ____ U.S. ____, 112 S.Ct. 1810, 1814 (1992). These limitations on certiorari jurisdiction under section 1257(a) insure that the state court has the first opportunity to address the federal question and that there is a sufficiently developed record to permit appropriate review of the state judgment. *Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).[7]

In this case, petitioner did not satisfy either of these concerns. The State court below never addressed a federal constitutional argument because petitioner never raised one. Although he argued "judicial estoppel" in his brief in opposition to respondents' appeal to the Appellate Division, he never framed the issue in constitutional terms and never argued, as he does in his petition, that the alleged "judicial estoppel" rose to the level of a constitutional violation. *See* Defendants-Respondents' Brief in Opposition, Appellate Division, Second Department, March 30, 1992 ("Def. Br.") at 65-68.[8] Nor did petitioner ever mention a Fourteenth Amendment due process claim

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[7] The Court has not determined whether section 1257(a) is jurisdictional, but ordinarily adheres to the restrictions on review in any event in light of these prudential considerations. *See Bankers Life, supra*, 486 U.S. at 85-87; *Cardinale v. Louisiana, supra*, 394 at 439.

[8] In that brief, as here, Easton mischaracterized the State's arguments in the two courts. He erroneously claimed that the State had described Easton in the federal case as a "mere employee of BPRI," and had argued that the State's actions against BPRI "had nothing to do with Dr. Easton." *Id.* at 66-67. The record belies these assertions, and, accordingly, the judicial estoppel argument was implicitly rejected by the court below, as it was by the Second Circuit Court of Appeals.

based on lack of evidence of his role in the fraud, although he filed numerous briefs to the court below in which he disputed the significance of various aspects of the State's evidence.

Petitioner did make a general, passing reference to a due process "fairness problem" in his brief to the New York Court of Appeals in support of his motion for leave to appeal the judgment. Defendants-Appellants' Brief to Court of Appeals, October 16, 1992, at 12. Because that court denied leave to appeal, however, petitioner's claim cannot be reviewed by this Court. Raising the issue for the first time in the context of an unsuccessful effort to obtain discretionary review by a higher state court does not suffice to grant jurisdiction under 28 U.S.C. § 1257(a). *Yee v. City of Escondido, California*, ____ U.S. ____, 112 S.Ct. 1522 (1992); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958).

Petitioner's failure to raise the constitutional questions below is reflected in the fact that he did not comply with Rule 14.1(h) of this Court, which requires that a petitioner specify in detail the stage in the proceedings below at which the federal questions were raised and the manner in which they were raised and ruled upon. Petitioner has not complied with this Rule because he is unable to do so. Accordingly, the writ should be denied.

B. Even if Jurisdiction Exists, Petitioner Has Failed to Raise a Question Worthy of This Court's Review

Even if petitioner met the prerequisites of section 1257(a), he has failed to articulate a constitutional claim worthy of this Court's attention. First, the factual predicates for his claims are lacking. Contrary to petitioner's contention, no judicial estoppel arose here, since the State presented each court with the same facts about Easton's role at BPRI. Judicial estoppel only applies where a party's legal strategy reflects "cold manipulation," *Matter of Cassidy*, 892 F.2d 637, 642 (7th Cir.), *cert. denied*, 498 U.S. 812 (1990), based on "clearly" or "unequivocally" inconsistent positions, *id.* at 641; *Consolidated Edison Co. v. Herrington*, 752 F.Supp. 1082, 1087 (D.D.C. 1990), *aff'd* 927 F.2d 1227 (1991), that is, legal or factual positions

that are "mutually exclusive," *United States v. Lehman*, 756 F.2d 725, 728 (9th Cir.), *cert. denied*, 474 U.S. 994 (1985), or "diametrically opposed," *F.D.I.C. v. CNA Casualty of Puerto Rico*, 786 F.Supp. 1082, 1086 (D.Puerto Rico 1991). In this case, the State did not "manipulate" or "play fast and loose with the courts," *Scarano v. Central Railroad Company of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953), as petitioner claims. Instead, each court issued its judgment after being accurately apprised of the details of the other proceeding.

Moreover, even if petitioner's statement of the facts were correct and the State had failed to advise the federal court of Easton's controlling position in BPRI, no issue of judicial estoppel would arise because the decisions of the two courts are not "mutually exclusive." Thus, even if Easton had not controlled BPRI, he would be liable for the Medicaid fraud under State law because of his personal design and supervision of the system. Conversely, Easton's control of BPRI and manipulation of BPRI's Medicaid billing records did not enable him to assert that corporate entity's constitutional rights. *Cf., Tuveson v. Florida Governor's Council on Indian Affairs, Inc.*, 734 F.2d 730 (11th Cir. 1984).[9]

Furthermore, assuming *arguendo* that the State did take inconsistent positions, petitioner would still fail to state a constitutional claim under the Due Process Clause. Judicial estoppel is a doctrine "intended to protect the courts rather than the litigants," *Cassidy*, 892 F.2d at 641-642. It does not grant a party any vested rights, and its application is within the sound discretion of the court based on the facts of each case. *Id.* at 642. For this reason, judicial estoppel ordinarily does not require prejudice or injury to the opponent. *Id.* at 641, n. 2. This is hardly the basis for a claim of constitutional dimension.

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[9] As noted, *supra* at 5, n.4, none of the plaintiffs in this case were parties in the federal case. Judicial estoppel prevents the same "party" from taking inconsistent positions and petitioner has not cited any case in which the doctrine was invoked based solely on the same counsel representing different parties.

Petitioner cites two decisions in which a judicial estoppel claim was considered in constitutional terms. *See Drake v. Kemp*, 762 F.2d 1449, 1470 (11th Cir. 1985) (Clark J., concurring), *cert denied*, 478 U.S. 1020 (1986); *Nichols v. Collins*, 802 F.Supp. 66 (S.D.Tex. 1992). Both cases involved criminal prosecutions, however, in which the prosecutors took "mutually exclusive" positions concerning the alleged criminal conduct, thus casting doubt on the validity of both convictions. *Drake*, 762 F.2d at 1479. This prosecutorial misconduct raised questions of fundamental fairness under the Fourteenth Amendment's prohibition against deprivation of liberty without due process of law.

Here, in contrast, the proceedings were civil, and petitioner has not cited any authority for the proposition that governmental inconsistency in a civil proceeding raises similar constitutional concerns. Indeed, conduct that is constitutionally impermissible in a criminal trial does not necessarily implicate federal rights when it occurs in a civil context. *See, e.g., Easton v. Sundram, supra*; (declining to recognize a cause of action under section 1983 for malicious civil prosecution); *accord, Jones v. Chicago*, 856 F.2d 985, 992 (7th Cir. 1988); *McMaster v. Cabinet for Human Resources*, 824 F.2d 518, 522 (6th Cir. 1987); *Cloutier v. Town of Epping*, 714 F.2d 1184 (1st Cir. 1983).

Nor has petitioner even attempted to articulate the theoretical basis for his constitutional claim or the reason it poses "an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 10.1(c). Instead, he simply argues the law of judicial estoppel, as he did unsuccessfully below, and concludes that it implicates his constitutional rights.

Finally, petitioner's contention that there was no evidence to sustain the findings against him, Pet. 16-18, is also controverted by the record. The court below correctly found "overwhelming evidence" of the fraud and expressly rejected Easton's claim that the home visits recorded were not billed to Medicaid. A. 5a. The court also cited the numerous evidentiary

bases for holding Easton personally liable under SSL § 145-b. A. 4a, 6a.

This case accordingly raises no due process concern and provides no other grounds for the Court to deviate from its usual reluctance to grant certiorari solely to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
August 5, 1993

Respectfully submitted,

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APPENDIX

APPENDIX

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION, SECOND DEPARTMENT, DATED JULY 6, 1992

91-06269, 91-10537, 92-04727

July 6, 1992

The PEOPLE of the State of New York, et al.,

Appellants,

—v.—

BROOKLYN PSYCHOSOCIAL REHABILITATION INSTITUTE, et al.,

Respondents.

Supreme Court, Appellate Division, Second Department.

LAWRENCE J. BRACKEN, J.P.
CHARLES B. LAWRENCE
DAVID S. RITTER
JOHN COPERTINO

MEMORANDUM BY THE COURT

In an action, *inter alia*, to enjoin the defendants from operating certain mental health facilities and to recoup public and residents' funds allegedly misappropriated by the defendants through Medicaid and real estate fraud, the plaintiffs appeal from (1) an order of the Supreme Court, Kings County (Ventiera, J.H.O.), dated May 6, 1991, which, after a nonjury trial, directed that the complaint be dismissed and severed the claims of the defendants 3 Lafayette Avenue Corporation and Cobble Hill Center Corporation to recover unpaid rent from a

court-appointed receiver, (2) an order of the same court, also dated May 6, 1991, which, *inter alia*, added the receiver as a party to the severed action, directed that interest be added to the rent to be paid by the receiver, and directed that a post-trial hearing be held on the issue of the market rental value of the facilities utilized by the receiver, and (3) a judgment of the same court, entered June 5, 1991, which dismissed the plaintiff's complaint in the original action.

ORDERED that the first order dated May 6, 1991, is modified by striking therefrom the provision directing a severance and the portion thereof which dismissed the complaint insofar as it is asserted against the defendant Karl Easton; as so modified, the first order dated May 6, 1991, is affirmed; and it is further,

ORDERED that the second order dated May 6, 1991, is modified, on the law, by deleting the third decretal paragraph thereof; as so modified, the second order dated May 6, 1991, is affirmed; and it is further,

ORDERED that the judgment is modified by (1) adding thereto a provision awarding judgment in favor of the plaintiffs and against the defendant Karl Easton in the principal sum of $7,573,703, representing the proceeds of Medicaid fraud and treble damages pursuant to Social Services Law § 145-b, (2) adding thereto a provision awarding judgment in favor of the defendants 3 Lafayette Avenue Corporation and Cobble Hill Center Corporation and against the receiver Federation Employment Guidance Service, in the principal sum of $38,708, and (3) adding to the first decretal paragraph thereof, after the phrase "hereby is dismissed" the words "in all other respects"; as so modified, the judgment is affirmed; and it is further,

ORDERED that the plaintiffs are awarded one bill of costs payable by the defendant Karl Easton.

The evidence established that Dr. Karl Easton controlled the Brooklyn Psychosocial Rehabilitation Institute (hereinafter BPRI), a not-for-profit corporation, which offered services to the mentally ill. The Easton family also controlled BPRI's landlords, Cobble Hill Center Corporation (hereinafter CHCC) and 3 Lafayette Avenue Corporation (hereinafter 3LAC), which

owned the premises leased to BPRI, housing its two facilities. These facilities included: (1) the Boerum Hill Community Residence (hereinafter BH), a supervised community residence for mentally disabled persons located at 50 Nevins Street, Brooklyn, which rented its premises from CHCC and housed 196 mentally disabled individuals, and (2) The Lafayette Center (hereinafter TLC), a continuing treatment outpatient program located some two blocks from BH at 3 Lafayette Avenue, Brooklyn, and which leased its property from 3LAC. Also affiliated with BPRI and rented from CHCC were the "Satellite Apartments", located at 415, 417, and 419 State Street, Brooklyn, where resided less mentally disabled persons who were capable of some degree of independent living but still required intermittent supervision. These facilities were licensed by the New York State Office of Mental Health (hereinafter OMH), and were funded by both Medicaid and Social Security. In their complaint, the plaintiffs charged, *inter alia*, that Easton defrauded Medicaid by improperly billing for "home visits" that were either not reimbursable or not performed. Indeed, they alleged that in 1985, for example, 95% of all "home visits" reimbursed by Medicaid State-wide were paid to BPRI.

The instant action was commenced by service of a summons and complaint on or about October 20, 1986. The trial consumed several days over a 10-month period. Following trial, J.H.O. Ventiera dismissed the complaint, while severing for a further hearing the claims for rent by the defendants 3LAC and CHCC against the court-appointed receiver, Federation Employment Guidance Service (hereinafter FEGS), for the period from October 20, 1986, to April 19, 1988, when the State took title by condemnation. On August 2, 1991, the rent hearing was stayed by this court pending determination of the instant appeal.

We find that the plaintiffs carried by overwhelming evidence their burden of proving that the defendants fraudulently billed Medicaid for "home visits" that were not actually performed, as the patient-staff interactions reported as BPRI "home visits" did not satisfy the Medicaid regulations and guidelines.

A "home visit" to a psychiatric patient by a qualified member of a clinical facility is contemplated by the OMH regulations and guidelines to be a rare event, to be provided in the patient's home environment when he is for some reason unable to attend the regular clinic or day treatment center. According to 14 NYCRR former 579.5(e) [effective Aug. 10, 1982, repealed Apr. 5, 1988]: "Services may be provided to patients at a location away from the [clinic] facility. Except for crisis services, the patient's treatment plan must include the location where off-site services will be provided and justify the need for such off-site services. Reimbursable off-site services shall be limited to assessment and treatment planning services, verbal therapies, medication therapy, crisis services, and case management services". A "home visit" is required to be at least 30 minutes in duration (14 NYCRR former 579.6[a][5]; [b][5]; [c][5] [effective Aug. 10, 1982, repealed Apr. 5, 1988]).

In late 1984 and early 1985, the defendant Dr. Easton initiated a new "home visit" policy at BPRI, according to which every casual contact between *any* BPRI employee and a client occurring off the clinic premises was to be recorded in a log as a "home visit". The plaintiffs proved that the enormous quantity of "home visits" billed to Medicaid by BPRI between January 1985 and October 1986 was directly traceable to this new "home visit" policy. Thus, the plaintiffs' witnesses testified that Easton insisted that all BPRI staff—including regular BH employees, whose *ordinary* job it was to wake up the residents, interact with them, motivate them, etc.—enter each of their routine and casual contacts with patients as "home visits". These "home visits", as recorded in BPRI's "home visit logs" after December 1984, failed to conform to Medicaid's definition of "home visits" for the following reasons: (1) they were done routinely rather than when patients were temporarily homebound, (2) they were performed in BH, a residence facility (i.e., a regular work location) rather than at the patient's home, (3) they were performed by regular BH floor staff rather than by qualified clinical therapists, (4) they were casual social contacts rather than contacts for the purpose of providing therapeutic services, (5) they were not therapeutically "justified",

(6) they were not documented, (7) their duration was not recorded, (8) they did not last (and could not be aggregated to) the requisite 30-minute minimum, and (9) each individual participating in a group activity was deemed to have had a "home visit", when a proper "home visit" was one-on-one.

The record does not support the defendants' contention that there was no relationship between those "home visits" recorded on the "home visit logs" and those billed to Medicaid. "Home visits" which were recorded on the "home visit logs" were then reported on the work sheet of the case manager responsible for that patient, as if the case manager had performed the visit himself. Also entered on the case manager's worksheet were all of the other services and attentions paid to that case manager's patients for that week. When the case manager's work sheet was sent to billing, the result was that *something* was billed to Medicaid for every patient for every day, although the facility could not bill *everything* entered on its in-house sheets without being in conspicuous violation of the Medicaid regulations. Thus, the evidence at trial established that if a patient was recorded as spending a full day ("F"), for example, at the clinic, *and* that patient was recorded as having received one or more "home visits" ("HVs") on the same day, the facility would bill Medicaid for an F rather than an HV.

Because there were, inevitably, more HVs entered on BPRI's home visit logs than were billed to Medicaid (since OMH regulations forbade more than one HV per day to the same patient), the defendants argued that they only *billed* "home visits" when the number of short contacts with a patient over the course of a day *added up* to a minimum of 30 minutes. Aside from the fact that—despite the Supreme Court's finding to the contrary—the regulations do not permit such an accumulation of home visit time, the plaintiffs' investigation showed that in some 72% of cases a "home visit" was traceable to *one* or *no* staff-to-client contact, while another 6% were undocumented.

The record thus reflects that between January 1985 and October 1986, through a scheme devised and implemented by Dr. Karl Easton, BPRI received $2,524,501 in public funds for

"home visits" that did not qualify for reimbursement under the OMH regulations.

Social Services Law § 145-b places personal liability on any individual who "knowingly by means of a false statement or representation, or by deliberate concealment of any material fact" falsely obtains—or attempts to obtain—public funds, "on behalf of himself or others". Where public welfare benefits are obtained fraudulently by an entity (e.g., BPRI), the individual supervising, overseeing, performing or conspiring to effectuate the fraudulent acts can be held personally responsible, and is liable for treble damages *(see, State of New York v. Britt*, 141 A.D.2d 911; *see also, United States v. Weiss*, 914 F.2d 1514, 1526, *cert denied sub nom Gleicher v. United States*, ____ U.S. ____, 111 S. Ct. 2888; *United States v. Brown*, 763 F.2d 984, 992, *cert denied* 474 U.S. 905; *Harvey-Cook v. Miroff*, 130 A.D.2d 621; *Harvey-Cook v. Steel*, 124 A.D.2d 709, 710). It is clear from the trial testimony that Easton designed, supervised, and implemented BPRI's "home visit" billing fraud on Medicaid.

Moreover, the plaintiffs proved that this fraud inured to the benefit of Easton and his family. BPRI's leases with Easton's realty corporations contained steep escalation clauses and so-called "net net" provisions, obligating the *tenant* to pay all taxes, expenses, repairs, etc. Such leases were *per se not negotiated at "arms length"*, as Department of Health (hereinafter DOH) expert David Hodgkins found, because Easton himself was controlling the bargaining on both sides of the bargaining table, in his not-for-profit capacity as Medical Director of BPRI, and his for-profit role as ultimate owner of CHCC and 3LAC (*see, Matter of Cantor v. Axelrod*, 63 N.Y.2d 965; *Matter of White Plains Nursing Home v. Axelrod*, 131 A.D.2d 24, 25). Through Easton's de facto control of the two realty corporations, which were ostensibly owned by his children, the family was personally enriched when the funds collected from the Medicaid fraud were paid in the form of grossly inflated rents.

In addition, because the leases were not negotiated at arms length, the court erred in determining that the so-called Medicaid "cap" did not apply to the rents during the receiver-

ship period. Mental Hygiene Law § 31.28(b)(4), which was patterned on the receivership statute of the DOH, Public Health Law § 2810(2)(b) (*see*, L.1984, ch. 863, Memorandum of Office of Mental Health) provides that if the leases to mental health community residences were negotiated at arms length, the rents contained therein would apply during a receivership period. If, on the other hand, they were not negotiated at arms length, the landlord is entitled to either the so-called Medicaid "cap" or the "fair monthly rental", whichever is lower (*see*, Mental Hygiene Law § 31.28[b][4]; Public Health Law § 2810[2][b]). Since the leases were *not* negotiated arms length, they should have been disregarded. Consequently, the Medicaid amounts ("the amount which *would* be reimbursable to the facility under the medical assistance program for real property costs *if* each patient in the facility were a recipient of medical assistance" [Mental Hygiene Law § 31.28(b)(4)], as computed and testified to by DOH expert Hodgkins (according to a formula derived from 10 NYCRR 86.2), should have been applied because they were lower than the stipulated "fair market rentals". By Hodgkins' computation, the Medicaid "cap" for both facilities together was $19,806 for 1986 and $18,902 for 1987.

We have considered the plaintiffs' remaining contentions and find that the further relief sought is not warranted on the record of these proceedings.